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IN THE

Supreme Court of the United States

CENTER FOR NATIONAL SECURITY STUDIES, *et al.*,
Petitioners,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the D.C. Circuit correctly ruled that the Department of Justice was exempt from any obligation under the Freedom of Information Act to release names and other basic information relating to hundreds of people who were detained in the weeks immediately following September 11, including many who were not even suspected of any linkage to terrorist activities?

2. Whether the First Amendment prohibits the Government from refusing to disclose the identities of those whom it has arrested and detained, absent a specific showing of a compelling need for secret arrests?

PARTIES TO THE PROCEEDING

Petitioners are the Center for National Security Studies, American Civil Liberties Union, Electronic Privacy Information Center, American-Arab Anti-Discrimination Committee, American Immigration Law Foundation, American Immigration Lawyers Association, Amnesty International USA, Arab-American Institute, Asian American Legal Defense and Education Fund, Center for Constitutional Rights, Center for Democracy and Technology, Council on American Islamic Relations, First Amendment Foundation, Human Rights Watch, The Multiracial Activist, The Nation Magazine, People for the American Way Foundation, Reporters Committee for Freedom of the Press, World Organization Against Torture. Respondent is the United States Department of Justice. All parties to the proceedings below are parties here.

RULE 29.6 DISCLOSURE

No corporate party to this petition is owned in part or in whole by a parent corporation or a publicly held company.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 DISCLOSURE ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Detainees Arrested in the Weeks After September 11 4

B. The Proceedings Below 8

1. The FOIA Request and the Government's Responses 8

2. The District Court 12

3. The Court of Appeals 13

REASONS FOR GRANTING THE WRIT 16

I. THE MAJORITY BELOW ERRED IN GIVING UNPRECEDENTED DEFERENCE TO GOVERNMENT EXPLANATIONS THAT WERE UNPERSUASIVE ON THEIR FACE, OVERLY BROAD, AND WITHOUT ANY SUPPORT IN THE RECORD 18

II. THE COURT OF APPEALS ERRED IN FAILING TO RECOGNIZE THAT THE FIRST AMENDMENT PROHIBITS SECRET ARRESTS AND DETENTIONS, EXCEPT IN THE MOST COMPELLING CIRCUMSTANCES. 25

CONCLUSION 30

Appendix A

Opinion, *Center for National Security Studies v. United States Department of Justice*, 331 F.3d 918 (D.C. Cir. 2003) 1a

Appendix B

Opinion, *Center for National Security Studies v. United States Department of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002) 64a

Appendix C

Constitutional and Statutory Provisions Involved 104a

Appendix D

Declaration of James Reynolds, *Center for National Security Studies v. United States Department of Justice*, No. 01-2500 (D.D.C. filed Jan. 11, 2002) 106a

Appendix E

Supplemental Declaration of James Reynolds, *Center for National Security Studies v. United States Department of Justice*, No. 01-2500 (D.D.C. filed Feb. 4, 2002) 123a

Appendix F

Declaration of Dale Watson, Detroit Free Press *v.* *Department of Justice*, No. 02-70339 (D.D.C. filed April 9, 2002) 128a

TABLE OF AUTHORITIES

CASES

ACLU of New Jersey, Inc. v. County of Hudson, 799 A.2d 629 (N.J. Super. Ct. App. Div. 2002), *certification denied*, 803 A.2d 1162 (N.J. 2002) 5

CIA v. Sims, 471 U.S. 159 (1985) 20

Campbell v. Untied States Department of Justice, 164 F.3d 20 (D.C. Cir. 1998) 18-19

Crooker v. Bureau of Alcohol, Tobacco & Firearms, 789 F.2d 64 (D.C. Cir. 1986) 19

Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) 4, 21, 26

Hayden v. National Security Agency/Central Security Service, 608 F.2d 1381 (D.C. Cir. 1989) ... 17, 19

Hunt v. CIA, 981 F.2d 1116 (9th Cir. 1992) 17, 19

King v. United States Department of Justice, 830 F.2d 210 (D.C. Cir. 1987) 20

Krikorian v. Department of State, 984 F.2d 461 (D.C. Cir. 1993) 19, 20

Los Angeles Police Department v. United Reporting Publishing Corp., 528 U.S. 32 (1999) 28

Lockington v. Smith, 15 F. Cas. 758 (C.C.D. Pa. 1817) (No. 8448) 27

McDonnell v. United States, 4 F.3d 1227 (3d Cir. 1993) 19

Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969) 24

North Jersey Media Group v. Ashcroft, 308 F.3d 198 (3d Cir. 2002), *cert denied*, 123 S. Ct. 2215 (2003) 4

Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) 26, 29

Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) 26

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 15, 26, 29

United States Department of Justice v. Reporters Committee For Freedom of Press, 489 U.S. 749 (1989) 27

United States Department of Defense v. Federal Labor Relations Authority, 510 U.S. 487 (1994) 24-25

Weissman v. CIA, 565 F.2d 692 (D.C. Cir. 1977) 20

STATUTES

Act Abolishing the Star Chamber, II(4), *in Sources of our Liberties* (Richard L. Perry ed. 1959) 27

An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, Mar. 3, 1863, 12 Stat. 755, ch. 81 (1863) 28

5 U.S.C. § 552(b) 22

5 U.S.C. § 552(b)(3) 9, 13

5 U.S.C. § 552(b)(7)(A) 9, 12, 13

5 U.S.C. § 552(b)(7)(C) 9, 12

5 U.S.C. § 552(b)(7)(F) 9, 13

Fed. R. Crim. P. 6(e) 9, 13

LEGISLATIVE MATERIAL

DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Senate Comm. on the Judiciary, 108th Cong. (Dec. 4, 2001) (testimony of Gerald H. Goldstein) available at http://judiciary.senate.gov/testimony.cfm?id=128&wit_id=82 6

MISCELLANEOUS

Amnesty International, *Amnesty International's Concerns Regarding Post September 11 Detentions in the USA* (March 2002) available at www.amnesty-usa.org/usacrisis/9.11.detentions2.pdf 6

Laurie P. Cohen, *Detainees on INS Breaches Held in Solitary Status*, Wall St. J., Nov. 1, 2001 6

Barbara Crossette, *Diplomats Protest lack of Information*, N.Y. Times, Dec. 20, 2001 7

Alison Leigh Cowen, *Detainees' Lawyers Complain of Unfair Treatment*, N.Y. Times, Oct. 21, 2001 6

Emery P. Dalesio, *Tanzanian Pilot Detained in N.C.*, The Associated Press, Apr. 18, 2002 11

The Federalist No. 84 (Alexander Hamilton) (I. Kramnick ed. 1987). 26-27

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Judith Miller and Philip Shenon, *Qaeda Leader in U.S. Custody Provokes Alert*, N.Y. Times, Apr. 20, 2002 12

Judith Miller and David Johnson, *F.B.I. Chief Says Al Qaeda Aide's Arrest Will Help Prevent Attacks by Terrorists*, N.Y. Times, Apr. 4, 2002 11-12

News Conference, Atty Gen. John Ashcroft (June 10, 2002), available at http:\www.usdoj.gov\ag \speeches\2002\061002agtranscripts.htm 11

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William Preston, Jr., *Aliens and Dissenters: Federal Suppression of Radicals 1903-1933* (1963) 16

William Rashbaum, *Captured Qaeda Member Gives Details on Group's* Operations, N.Y. Times, Jul. 27, 2002 11

James Risen and Philip Shenon, *U.S. Says it Halted* Quaeda *Plot to Use Radioactive Bomb*, N.Y. Times, June 11, 2002 11

Lois Romano and David S. Fallis, *Questions Swirl Around Men Held in Terror Probe*, Wash. Post, Oct. 15, 2001 6

Rumsfeld *Interview on Fox News Channel*, April 12, 2002, available at http:\www.defenslink.mil \news\Apr2002\04122002_t041fox.html 11

Richard A. Serrano, *U.S. Strike Back Rights Many Held in Terror Probe Report Rights Being Abused*, L.A. Times, Oct. 15, 2001 6

Philip Shenon, *African held After Name is Left in Cave*, N.Y. Times, April 18, 2002 11

PETITION FOR WRIT OF CERTIORARI

Petitioners seek review of a divided decision of the U.S. Court of Appeals for the D.C. Circuit holding that they have no right under the Freedom of Information Act or the First Amendment to be told the names or other basic information relating to over 700 individuals secretly detained by the federal government in the weeks following the September 11, 2001 attacks on New York and Washington. The D.C. Circuit abandoned its proper judicial role, and effectively amended the Act by judicial fiat, when it deferred to government rationales for withholding that (1) were highly questionable on their face and (2) were phrased in such general terms that they wholly failed to account for relevant differences among the detainees. This Court should grant certiorari to ensure that even after September 11, the judiciary will continue to fulfill its constitutional and statutory obligation to provide meaningful review of the exercise of executive power. The lower court's ratification of secret arrests has no precedent in this Nation's laws or history and should be reconsidered by this Court.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 331 F.3d 918 (D.C. Cir. 2003), and is reproduced at Pet. App. 1a. The opinion of the District Court is reported at 215 F. Supp. 2d 94 (D.D.C. 2002), and is reproduced at Pet. App. 64a.

JURISDICTION

The decision of the court of appeals was issued June 17, 2003. On September 9, 2003, the Chief Justice extended the time to file this petition to September 29, 2003. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment and Sections (a)(3)(A), (b)(7)(A), (C) & (F) of the Freedom of Information Act, 5 U.S.C. § 552(a)(3)(A), (b)(7)(A), (b)(7)(C) & (b)(7)(F), are reproduced at Pet. App. 104a.

STATEMENT OF THE CASE

In the seven weeks after September 11, 2001, the federal government took more than 1100 individuals into custody in the course of its investigation of the terrorist attacks against the United States. In so doing, the Government not only failed to make public the identities and specific circumstances of each of the detainees, it also took affirmative steps – such as sealing INS records and omitting names from jail rosters – to prevent those facts from coming to light. As reports of civil rights violations against those in custody mounted, Petitioners sought to obtain the names and other basic information about the detainees under the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* ("FOIA"), and the First Amendment. The Government in large part refused this request – although it later released some information about the minority of the detainees who were criminally charged – and Petitioners brought suit. A divided D.C. Circuit panel ultimately held that the Government was not required to disclose the names of the detainees who were never criminally charged, their lawyers' names (if in fact they had counsel), or other basic information under FOIA and the First Amendment – extending this exemption even to the hundreds of detainees whom the Government itself had identified as not of interest to the investigation.

That decision requires review here. It is the responsibility of the courts – and particularly this Court – to provide meaningful judicial review when the Government invokes

national security to justify unprecedented secrecy in exercising its awesome power to arrest and detain hundreds of people. History shows that, in times of crisis and fear, executive officials are prone to overreact, especially in their treatment of minorities in our midst. The requests for information at issue here were designed to shed light on one of the Government's first reactions to September 11 – the swift arrest and lengthy detention of hundreds of people, nearly all Arabs or Muslims. Several interrelated aspects of this sweep of arrests – including not only the secrecy of the operation but also predictable consequences of secret detentions like denials of counsel, lengthy detentions without charges, and reports of abuse by jailors – require careful review of the Government's claims that it could not release the information sought by Petitioners in 2002 and cannot do so now.

But the D.C. Circuit abdicated the proper judicial role, inventing a toothless form of deferential review that gave credence to facially weak government arguments and then compounded that error by assuming they applied with equal force to all those secretly detained, including the large subset of individuals who had been *cleared* of any involvement with terrorism. This reductionist, one-argument-fits-all approach is completely at odds with FOIA case law as well of common sense. As the dissenting judge below noted, it effectively amends FOIA without congressional authorization. The court of appeals also broke with core First Amendment values in concluding that there is no constitutional basis for demanding information from the Government about those whom it has jailed, unless and until the Government chooses to bring criminal proceedings against them.

A. Detainees Arrested in the Weeks After September 11

Beginning on September 11, 2001, "the United States government launched a massive investigation into the attacks as well as into 'threats, conspiracies, and attempts to perpetrate terrorist acts against [the] United States.'" Pet. App. 67a (quoting Declaration of James S. Reynolds ("Reynolds Decl."), Pet. App. 107a, ¶ 2). Six weeks later, on October 25, 2001, the Attorney General announced that nearly 1,000 individuals had been detained as part of this investigation. *Id.* Ten days after that, the number of reported detainees had risen to 1182. Pet. App. 72a n.7. Shortly thereafter, the Department of Justice "announced that it would no longer provide a running total of all individuals detained in connection with the investigation." *Id.*

The Department, although indicating that the detainees fell into three categories – those criminally charged, those held on immigration charges, and those held on "material witness" warrants – refused to disclose the names of those detained, the names of their counsel (if any), the dates of their arrests, any charges that had been brought, or the dates on which any had been released. Pet. App. 69a. Moreover, the Government took affirmative steps to keep the identities of the detainees secret from the public. For example, with respect to the largest group of detainees – those held on immigration charges, who were designated as "special interest detainees" – the Attorney General ordered special procedures making the dockets in their cases secret and precluding government employees from even acknowledging their existence.[1] Similarly, when a state court order

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[1] Watson Decl. ¶ 9, Pet. App. 131a. *Cf. Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (secret hearings unconstitutional); *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) (secret hearings not unconstitutional), *cert denied*, 123 S. Ct. 2215 (2003).

enforcing a state statute requiring county jails to keep a public roster of inmates threatened to disclose the names of some INS detainees, the Government issued a new regulation forbidding release of the names.[2] In addition, as we now know, the Government also sharply limited the ability of at least some of the detainees to communicate with the outside world. *See* pp. 7-8 *infra*.

Although these individuals came to the Government's attention in the course of its terrorism investigation, the Government does not claim that the detentions were based on suspicions of complicity in terrorism. To the contrary, individuals often became "September 11 detainees" merely as a result of being questioned and determined to be in violation of INS requirements or unrelated criminal laws.[3] Moreover, the fact that a person was questioned by no means meant that the Government had any credible indications that he was involved with terrorism. As a recent report by the Justice Department's Office of the Inspector General ("OIG") confirmed, the questioning often was triggered by a multitude of unreliable "tips" the Government received from private citizens about Middle Eastern men thought to be suspicious. *See* Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks*, at 16 (April 2003) (available at www.usdoj.gov/OIG/special/03-06/full.pdf) ("OIG Report"). In this process, moreover, "no distinction generally was made between the subjects of the lead and any other individuals encountered at the scene." *Id.* Mere proximity, combined with an apparent lack of a valid visa,

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[2] *ACLU of New Jersey, Inc. v. County of Hudson*, 799 A.2d 629 (N.J. Super. Ct. App. Div. 2002), *certification denied*, 803 A.2d 1162 (N.J. 2002).

[3] *See* Reynolds Decl. ¶ 10, Pet. App. 110a; Reynolds Supp. Decl. ¶ 3, Pet. App. 124a.

was enough for an Arab or Muslim individual to find himself secretly detained.[4]

Indeed, the government created a category of "inactive" September 11 detainees, applied to those held on INS charges who never were, or were later determined not to be, of interest to the investigation. By early 2002, long before the first ruling in the courts below, almost half of the INS detainees had been so designated. *See* Def. Amended Ex. 6 in Support of Gov't Mot. for Summ. J. (filed Feb. 5, 2002).

Within weeks after September 11, news stories began to appear that raised serious concerns about the manner in which these individuals were arrested and detained.[5] These articles were corroborated by testimony from lawyers,[6] later by reports from human rights groups,[7] and, much later, by the OIG. Petitioners and many others thus began to question whether detainees were being held based primarily on their

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[4] A good illustration is one alien who "was arrested, detained on immigration charges, and treated as a September 11 detainee because a person called the FBI to report that the . . . grocery store in which the alien worked, 'is operated by numerous Middle Eastern men . . . . Too many people to run a small store.'" OIG Report at 17.

[5] *See e.g.*, Lois Romano and David S. Fallis, *Questions Swirl Around Men Held in Terror Probe*, Wash. Post, Oct. 15, 2001, at A1; Richard A. Serrano, *U.S. Strikes Back Rights Many Held in Terror Probe Report Rights Being Abused*, L.A. Times, Oct. 15, 2001, at A1; Alison Leigh Cowen, *Detainees' Lawyers Complain of Unfair Treatment*, N.Y. Times, Oct. 21, 2001, at 1B; Laurie P. Cohen, *Detainees on INS Breaches Held in Solitary Status*, Wall St. J., Nov. 1, 2001 at A8.

[6] *E.g.*, *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Senate Comm. on the Judiciary*, 108th Cong. at 1-3 (Dec. 4, 2001) (testimony of Gerald H. Goldstein) available at http://judiciary.senate.gov/testimony.cfm?id=28&wit_id=82.

[7] *See* Human Rights Watch, *Presumption of Guilt* at 7, 33-45, 67-87, available at www.hrw.org/reports/2002/us911; Amnesty International, *Amnesty International's Concerns Regarding Post September 11 Detentions in the USA* at 16-18, 28-38 (March 2002), available at www.amnesty-usa.org/usacrisis/9.11.detentions2.pdf.

ethnicity or religion, were being held incommunicado for long periods without being charged,[8] were being denied meaningful access to counsel, and were subject to physical and mental abuse. The OIG report confirmed a number of these suspicions, finding that after the detainees were secretly arrested, many were not charged for days or weeks and were held in harsh conditions without bail, even when there was no evidence to justify withholding bail. OIG Report at 35, 88. Further, the report found that although some government officials expressed concern about the government's actions, the secret arrests and indeterminate detentions continued. *Id.* at 81-83. The report ultimately concluded, after inquiring into the practices of a subset of the relevant detention facilities, that at least some detainees were never offered counsel or were tricked into forfeiting that opportunity,[9] while others were slammed against walls by

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[8] In one instance, the Canadian government reportedly protested that a Canadian citizen "disappeared" on September 20, 2001, and his detention was not disclosed by federal authorities for nearly three months. According to published reports, the government failed to disclose his detention despite his requests for consular assistance, and despite inquiries by the Canadian authorities. *E.g.*, Barbara Crossette, *Diplomats Protest Lack of Information*, NY Times, Dec. 20, 2001 at B5.

[9] Some detainees were not offered the opportunity to call an attorney until weeks or months after being incarcerated, or were never given the opportunity to do so at all. Many of those who were allowed to call attorneys were given at most one call per week, and in contravention of official policy, were told that a call resulting in a busy signal or answering machine message counted as the weekly call. OIG Report at 133-34. Moreover, at the Metropolitan Detention Center ("MDC") in New York, where many detainees were housed, the employee in charge of asking whether detainees would like to call an attorney asked them simply "are you okay." An affirmative response was taken by that employee to mean that the detainee—many of whom did not speak fluent English—did not want to contact an attorney. *Id.* at 132. Attorneys also had difficulties visiting detainees. The Department of Justice kept the persons detained in this operation off lists of inmates at the MDC. Consequently, when many attorneys called the MDC to schedule a visit,

guards and kept in fully lit cells 24 hours a day. OIG Report at 142-44, 153.

B. The Proceedings Below

1. The FOIA request and the Government's Responses

On October 29, 2001, acting pursuant to FOIA and the First Amendment, Petitioners sent the Department of Justice three requests for information about persons detained in the wake of the September 11 attacks. Petitioners asked that the Department disclose the name of each detainee and his attorney. They also requested certain other basic information about the detainees and their detention.[10]

In granting Petitioners' request for expedited processing of their FOIA requests, the Government conceded that the request was a "matter of widespread and exceptional media interest in which there exist questions about the

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or arrived for a visit, they were told the person they wished to see was not at the MDC. *Id.* at 135-37.

[10] Petitioners' request sought information about "the individuals arrested or detained" in the words of Attorney General Ashcroft, in the wake of the September 11 attack and referred to by the President, the Attorney General and the FBI Director in various public statements. Reynolds Decl. ¶ 6, Pet. App. 108a. They asked the Justice Department to tell them the citizenship status of each detainee, where each person was originally detained, where each detainee still in custody was being held, the date on which each was arrested, the date any charges were brought, the date on which any detainee not still in custody was released, the charges brought against each detainee or the other basis on which the detainee was being held—such as a material witness warrant—and the disposition of any such charges or warrants, the name and addresses of any lawyers representing the detainees, the identities of courts that entered sealing orders in proceedings related to these detainees, any sealing orders that have been entered, the legal authorities relied upon by the government in seeking sealing orders, and policy directives or guidance provided to officials on what they can publicly disclose about these detainees. *Id.*

government's integrity which affect public confidence." Pet. App. 69a. Nevertheless, the Department of Justice initially refused to provide any information whatsoever. After the Senate Judiciary Committee scheduled a hearing on the detentions, the Department released a list of the names of those individuals who had been detained and later charged with a crime, along with the nature of the charge. But it kept secret the names of other detainees and their lawyers, if any, stating that all of the requested information was exempt from disclosure under Exemption 7(A) of FOIA, 5 U.S.C. § 552(b)(7)(A), which applies to release of materials that "could reasonably be expected to interfere with [law] enforcement proceedings," Exemption 7(C), *id.* § 552(b)(7)(C), which applies to release of law enforcement materials that could constitute an "unwarranted invasion of personal privacy," and Exemption 7(F), *id.* § 552(b)(7)(F), which applies to information that could "reasonably be expected to endanger the life or physical safety of any individual." Petitioners then brought suit in the U.S. District Court for the District of Columbia. By the time cross-motions for summary judgment were filed and considered by the District Court during the summer of 2002, the Government had made some additional disclosures concerning persons in two of the categories.

First, the Government produced a somewhat more complete list of criminally charged detainees, showing that there were approximately 129 people in this group, 73 of whom remained in custody by June 11, 2002. Pet. App. at 71a[11] Very few of the criminal charges related in any way to

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[11] In the District Court, the Government explained its decision to disclose the names of criminally charged detainees as a response to the "constitutional mandate" that "all criminal prosecutions be 'public.'" Defs. Reply in Support of Mot. for Summ. J. at 19 (filed April 15, 2002) (citing the First and Sixth Amendments and *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7 (1986)).

terrorism, *id.*, and only one defendant on the list, Zacarias Moussaoui (who was arrested prior to September 11), was charged as a conspirator in the September 11 attacks. The government also identified the lawyers for this group, but it continued to withhold information about the dates and locations of the arrests and the dates and locations of the detentions. *Id.*

Next, the Department of Justice acknowledged that 751 individuals had been detained for immigration violations ("INS detainees"). Pet. App. 70a. As of June 13, 2002, 74 remained in custody. *Id.* 79a. As noted above, many of these detainees had been cleared of any link to terrorism. The Government indicated that as of February 2002, 338 of the INS detainees had been placed in "inactive status" based on a determination that they were not "of current interest" to the September 11 investigation. *See* Def. Amended Ex. 6 in support of Gov't Mot. for Summ. J. (filed Feb. 5, 2002); Supp. Reynolds Decl. ¶ 3, Pet. App. 124a; Def. Mem. in Support of Summ. J. 21 (filed Jan. 11, 2002) ("many [detainees] have [been] or may be cleared of wrongdoing"). But the Government refused to divulge even those names. The Government did release for most detainees information about their citizenship status and place of birth, as well as the date on which immigration charges were filed and nature of those charges. Pet. App. 70a. It refused to release their names, the locations of their arrests, the locations of their incarceration, their lawyers' names or the dates of their release, if any. *Id.* Nearly all of the INS detainees came from Arab or Muslim countries. *See* Def. Amended Ex. 6 in support of Gov't Mot. for Summ. J. (Feb. 5, 2002).

The final group consisted of detainees held on material witness warrants. The Government provided *no* information whatsoever about these detainees, Pet. App. 71a, even as it acknowledged that "it may turn out that these individuals have no information useful to the investigation." Reynolds

Decl. ¶ 36, Pet. App. 119a-120a. As to these individuals, the Government in the District Court invoked an additional FOIA exception – Exemption 3, 5 U.S.C. § 552(b)(3), which applies to materials "specifically exempted from disclosure by [another] statute." The claim was that information about material witness detainees was shielded by Federal Rule of Criminal Procedure 6(e)(2)(B), which restricts disclosure of matters "occurring before the grand jury."

Despite its insistence that it could not reveal the names of the many people who were secretly detained in the weeks following September 11 but not alleged to have links to terrorism, the Government did not remain silent about other people it subsequently detained during its investigation, who *were* alleged to be involved in terrorism. For instance, the following April, the FBI announced that it had arrested Issaya Nombo, Adham Hassoun, and Ramsi Al-Shannaq on immigration charges, and disclosed details about why these men had been investigated.[12] It provided similar information about Mohammad Mansur Jabarah, who was detained on a material witness warrant. Pet. App. 77a n.10.[13] Moreover, it has released large quantities of information about other people who have been captured since September 11 and held as terrorists but never criminally charged, including American citizens held as enemy combatants.[14]

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[12] Emery P. Dalesio, *Tanzanian Pilot Detained in N.C.*, The Associated Press, Apr. 18, 2002; Philip Shenon, *African held After Name is Left in Cave*, N.Y. Times, April 18, 2002, at A15.

[13] William Rashbaum, *Captured Qaeda Member Gives Details on Group's Operations*, N.Y. Times, July 27, 2002, at A8.

[14] *See, e.g.*, News Conference, Atty Gen. John Ashcroft, (June 10, 2002), available at http:\www.usdoj.gov\ag\speeches\2002\061002 agtranscripts.htm; James Risen and Philip Shenon, *U.S. Says it Halted* Quaeda *Plot to Use Radioactive Bomb*, N.Y. Times, June 11, 2002, at Al; *Rumsfeld Interview on Fox News Channel*, April 12, 2002, available at http:\www.defenslink.mil\news\Apr2002\04122002_t041fox.html; Judith Miller and David Johnson, *F.B.I. Chief Says Al Qaeda Aide's Arrest Will*

2. The District Court

As noted, the parties presented the District Court with cross-motions for summary judgment. The Government relied primarily on declarations by a senior Justice Department official (James Reynolds) and an FBI Agent (Dale Watson), attempting to explain why it would be harmful to disclose information. *See* Pet. App. 6a-7a.

The District Court, on August 2, 2002, granted summary judgment for Petitioners in part. Relying on FOIA, it ordered the Government to disclose the names of the detainees and their attorneys, but not other information such as the dates and locations of their arrests, detention, and release. The court first ruled that the Government's declarations had failed to show how disclosure of the INS and material-witness detainees' names and attorneys – matching what had already been disclosed concerning the criminal detainees – could interfere with law enforcement proceedings, as required to qualify for Exemption 7(A). Pet. App. 75a-84a. It noted that the declarations provided no evidence that such disclosures would deter witness cooperation or enable suspects to manufacture false evidence – especially as to those detainees not actually involved with any wrongdoing. Pet. App. 77a-80a, 83a-84a.

Moreover, the court rejected the Government's assertions that disclosure of names and addresses would enable suspects to map the investigation and thereby find means to impede it—the Government's "mosaic theory". Pet. App. 80a-83a. It reasoned that allowing such a claim in a criminal enforcement context would essentially allow the Government to withhold all information, however innocuous, in every case. With regard to Exemptions 7(C)

Help Prevent Attacks by Terrorists, N.Y. Times, Apr. 4, 2002, at A14; Judith Miller and Philip Shenon, *Qaeda Leader in U.S. Custody Provokes Alert*, N.Y. Times, Apr. 20, 2002, at A1.

and 7(F) the court found that the privacy interests of detainees could not be used by the Government to justify a blanket refusal to disclose the names of detainees or their attorneys – although it also created an opportunity for individual detainees to "opt out" of public disclosure. Pet. App. 86a. Finally, addressing Exemption 3, the court rejected the idea that Fed. R. Crim. P. 6(e) requires withholding all information about all material witness detainees, as the declarations did not show that all material witness detainees even testified before a grand jury. Pet. App. 89a.

The District Court concluded, however, that disclosure of additional information about the circumstances of the arrest and detention of the detainees, beyond the names of detainees and their counsel, could be of use to terrorists and thus was not required under Exemption 7(A) of FOIA. The court went on to reject Petitioners' alternative argument that the First Amendment creates a right of access to this additional information. Applying the "experience and logic" test derived from this Court's *Richmond Newspapers* line of cases, it found that while there may be a tradition of disclosure of the fact of a person's arrest, that tradition did not extend to the additional information the court had already found not to be subject to disclosure under FOIA.

3. The Court of Appeals

A divided panel of the Court of Appeals reversed the District Court's determination that the names of detainees and their attorneys must be released, holding that FOIA Exemption 7(A) justifies nondisclosure of this information because of the potential for interference with the September 11 investigation. The majority opinion, however, did not demand the kind of evidence of a clear nexus between disclosure and harm that is routinely required in FOIA cases. The majority held that it owed deference to the Government

in "FOIA national security cases" and proceeded to apply a standard of review much less demanding than that applied in prior national security cases.

First, the court focused on whether the Government had shown that disclosure of information regarding *all* of the detainees might provide important information to terrorists. The court thus accepted a general representation that release of a "complete list" of detainees "would give terrorist organizations a composite picture of the government investigation," Pet. App. 17a-18a, as sufficient reason to deny the release of *any* names, including the names of those detainees who were no longer "of interest" to the FBI. The court did not consider the possibility of a partial release designed not to provide a useful roadmap.

Similarly, the court accepted the Government's assertion that *all* of their names must be withheld because *some* detainees who had no link to terrorism *might* otherwise be discouraged from becoming government informants and infiltrating terrorist groups. Pet. App. 20a. Again, it did not consider the possibility that the Government could disclose persons it knew did not fit this description.

The court gave no weight to circumstances that undercut the logic of the Government's position. Thus, it rejected the argument that the Government's refusal to provide any information was much less defensible if, as the Government maintained, detainees were themselves free to communicate their status to the outside world. Pet. App. 21a. And the court also rejected as irrelevant the fact that the Government itself had announced the arrest and detention of a number of persons actually linked to terrorism – speculating on the basis of no evidence that these disclosures may have been for strategic reasons. Pet. App. 22a.

Turning to the First Amendment, the majority then ruled that there is no constitutional right of access to any

information that is non-judicial and "not part of a criminal trial." Pet. App. 28a. It reasoned that the two-part test governing the First Amendment right of access to information in the Government's control, outlined in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), applies only to access to judicial proceedings or transcripts of such proceedings, and thus that there is no constitutional basis for a request for information about arrestees not yet (or never) brought up on charges.

In dissent, Judge Tatel criticized the majority for having "converted deference into acquiescence." Pet. App. 40a. He also criticized the majority's willingness to apply government explanations for nondisclosure to broad categories of detainees, instead of requiring the disclosure of those subsets of information for which the Government's rationales were not persuasive. *Id.* at 40a-41a. While challenging the notion that the Government's arguments were entitled to any special deference, he concluded that the Government's case failed regardless whether deference was given to it. *Id.* at 38a-39a. This was because the Government never provided *any reason to think* that releasing the names, or other personal information, of detainees *not linked to terrorism* would harm its investigation. *Id.* at 44a. He emphasized that the Government drew no distinction between individuals cleared of any terrorism connections and others on the list, and that this categorical approach was wholly impermissible under FOIA. *Id.* He suggested that the majority's approach effectively "change[d] the law in Congress' stead," and concluded that the District Court properly ordered disclosure at least as to those detainees lacking links to terrorism. Pet. App. 63a.

REASONS FOR GRANTING THE WRIT

It can hardly be doubted, in the wake of September 11, that the Government has weighty obligations to try to prevent future terrorist attacks and to apprehend and punish those responsible for past attacks. But neither can it be doubted that times of crisis and fear demand vigilance from citizens and their courts to assure that the counter-measures adopted by the executive are consistent with our fundamental values and constitutional principles. Here, Petitioners made their requests for information about the secret arrest of hundreds of Arabs, Muslims, and others, because the secrecy surrounding the arrests made vigilance impossible. They then asked the courts to play their appointed role under FOIA and the First Amendment in reviewing in a meaningful way the Government's claim that public oversight was not consistent with national security. The D.C. Circuit, however, did not answer that call, instead accepting at face value explanations from the Government that made little sense, could not be squared with the Government's own conduct, and blurred all potential distinctions among different categories of persons in detention. That decision merits review by this Court.

This is not the first time the Government has reacted to a perceived threat with massive arrests of persons of foreign origin. But those past events, including both the "Palmer Raids" of 1919[15] and the internment of Japanese-Americans in World War II, are painful memories because they came to be understood as extraordinarily harmful overreactions. The same description may or may not be apt in the current

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[15] The Palmer Raids, a reaction to the "Red Scare" after World War I and bombings attributed to radicals, involved arrests of thousands of persons – most of them of foreign extraction – who were rounded up without probable cause. Few if any actual plots against the Government were uncovered. *See generally* William Preston, Jr., *Aliens and Dissenters: Federal Suppression of Radicals 1903-1933*, at 209-29 (1963).

circumstances, but what is certain is that the unprecedented secrecy associated with the 2001 detentions has prevented the public from making that judgment.

FOIA was designed to provide a remedy for such a barrier to democratic oversight, absent a persuasive showing that openness would do more harm than good. The D.C. Circuit short-circuited that statutory protection by adopting a toothless form of judicial "scrutiny" that has no precedent in prior FOIA cases – even those involving access to classified documents or intelligence sources and methods. *See, e.g.*, *Hunt v. CIA*, 981 F.2d 1116, 1119 (9th Cir. 1992); *Hayden v. National Sec. Agency/Cent. Sec. Serv.*, 608 F.2d 1381, 1387 (D.C. Cir. 1989). Such an approach, as a practical matter, transforms FOIA by judicial fiat into a statute under which citizens request information from their elected leaders and those leaders then decide for themselves what information they wish to disclose. It may sometimes be understandable for courts to defer to the Government in national security matters, but deference does not imply withholding meaningful scrutiny altogether, especially where there are countervailing interests of constitutional magnitude at stake.

The D.C. Circuit further erred in ruling that the First Amendment is not implicated by secret arrests. Even leaving aside FOIA, all of the policies that underlie this Court's *Richmond Newspapers* line of cases apply equally to the issue of withholding information concerning persons who have been arrested by the Government but not yet brought to court (if indeed they ever will be).

The information Petitioners seek is a vital prerequisite for the public to assess its government's response to September 11. Names of detainees could reveal a pattern of discrimination; names of their attorneys could show who may have been denied counsel and lead to other information; and dates of arrest could show the length of detention.

Based on both internal and external reports there is every reason to think that some of those arrested were treated illegally. The fact that most of those detained are no longer in custody gives more not less reason to be concerned that the Government acted improperly in secretly detaining them in the first place.

This Court should therefore grant review here to assess the justifications offered for the Government's refusal to disclose this information, which continues to this day. Such review would serve to assure that the Government is not merely avoiding scrutiny of a discriminatory overreaction to the September 11 attack and to deter future deprivations of civil liberties.

I. THE MAJORITY BELOW ERRED IN GIVING UNPRECEDENTED DEFERENCE TO GOVERNMENT EXPLANATIONS THAT WERE UNPERSUASIVE ON THEIR FACE, OVERLY BROAD, AND WITHOUT ANY SUPPORT IN THE RECORD.

The D.C. Circuit in this case was the first court to extend the deferential form of review previously applied only in cases involving FOIA Exemption 1 (classified material) or Exemption 3 (intelligence information protected under the National Security Act) to a law enforcement context. But even assuming that this novel application of deference was appropriate – and there is good reason to conclude otherwise, *see* Pet. App. 38a-39a (Tatel, J., dissenting) – the D.C. Circuit went too far in applying a standard that effectively eliminated any meaningful judicial role. For even under the deferential standard applied in previous national security cases, the D.C. Circuit was still obliged to reject to agency allegations that were fatally flawed by a "lack of detail and specificity . . . [and a] failure to account for contrary record evidence." *Campbell v. United States Dep't of Justice*, 164

F.3d 20, 30 (D.C. Cir. 1998). This Court should grant review to make clear that a national security crisis is no justification for courts allowing the Government to evade so easily its responsibilities under FOIA – and that courts cannot ignore the vital countervailing interests at stake such as the individual rights Petitioners here seek to enforce.

As Judge Tatel recognized in his dissent, D.C. Circuit law has never equated deferential review with "'vacuous'" review. *See* Pet. App. 39a (quoting *Pratt v. Webster*, 673 F.2d 408, 421 (D.C. Cir. 1982)). Instead, even in applying Exemptions 1 and 3, prior cases have required "justifications [that are not] controverted by contrary evidence," *Hunt v. CIA*, 981 F.2d 1116, 1119 (9th Cir. 1992), and that do not rely upon "vague or sweeping" assertions. *Hayden*, 608 F.2d at 1387; *see also, e.g.*, *McDonnell v. United States*, 4 F.3d 1227, 1243 (3d Cir. 1993) (requiring Exemption 1 affidavits to exhibit "reasonable specificity" and a "logical connection between the information and the claimed exemption") (quoting *Salisbury v. United States*, 690 F.2d 966, 970 (D.C. Cir. 1982)); *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 789 F.2d 64, 67 (D.C. Cir. 1986) (requiring that the government show a "rational link" between disclosure and harm). A critical tenet of FOIA analysis is that the government may not lump together distinct categories of information and withhold them under a single rationale that applies, at best, only to a subset of the information sought. *See, e.g.*, *Crooker*, 789 F.2d at 67.

The Exemption 1 and 3 cases cited by the D.C. Circuit for the proposition that deference is necessary do not support the form of unquestioning review actually applied here. Those cases all involved government rationales for withholding that had a logical coherence based on a discussion of particular facts and were not "controverted by contrary evidence." *Hunt*, 981 F.2d at 1119. For example, in *Krikorian v. Department of State*, 984 F.2d 461 (D.C. Cir.

1993), the D.C. Circuit accepted an Exemption 1 withholding claim in part on the basis of an declaration that stated that the classified material in question had been obtained from a foreign government on the premise that it would remain confidential. The court accepted the government's argument that disclosing the information would jeopardize "reciprocal confidentiality," *id.* at 464-65, but it also remanded the case to determine whether "portions of the documents may not be exempt" because they did not implicate such concerns. *Id.* at 466-67.[16]

The generalized rationales for non-disclosure offered in this case fall far short by comparison. As a preliminary matter, it is worth noting that of those whose names were withheld, none were criminally charged and a mere handful were charged with terrorism-related violations of the immigration laws. Indeed, the Government's declarations actually made no claim that any person whose name was withheld was linked to terrorism.[17] Nevertheless, the Government offered four reasons, which were summarized in the first Reynolds declaration, why it could not safely

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[16] *See also CIA v. Sims*, 471 U.S. 159, 179 (1985) (where court ruled that researcher's names were covered by intelligence sources exemption, and affidavit stated that disclosure of the names of researcher's academic institutions would enable a person to discern the identities of the individual researchers, the court gave the affidavit some deference, and withheld institutional affiliation from disclosure); *Weissman v. CIA*, 565 F.2d 692, 698 (D.C. Cir. 1977) (agency affidavits that summarize each document or document section withheld for national security reasons are entitled to deference, where there is no reason to question their veracity); *King v. United States Dep't of Justice*, 830 F.2d 210, 221-23 & n.92 (D.C. Cir. 1987) (affidavit submitted in support of Exemption 1 claim where deleted parts are marked with a code saying that information falls into a one of a few broad categories, such as "information concerning intelligence activities, sources, and methods" is insufficiently specific to warrant the district court's deference).

[17] This glaring omission contradicts the D.C. Circuit's assertion that "many of the detainees have links to terrorism." Pet. App. 23a-24a.

release the names of any of the detainees (or disclose their attorneys, if any):

1. Revealing the names could yield the names of "individuals associated with them, other investigative sources, and potential witnesses" and could subject the detainees to intimidation by terrorist groups. Reynolds Decl. ¶ 14, Pet. App. 111a-112a.

2. Revealing the names could deter detainees from cooperating after their release and impair their ability to infiltrate into terrorist organizations. *Id.* ¶ 15, Pet. App. 112a.

3. Revealing the names could "reveal the direction and progress of the investigations by identifying where DOJ is focusing its efforts." *Id.* ¶ 16, Pet. App. 112a-113a.

4. Revealing the names could "allow terrorist organizations and others to interfere with the pending proceedings by creating false or misleading evidence." *Id.* ¶ 17, Pet. App. 113a.

As both the District Court and Judge Tatel in dissent noted, these rationales suffer from two obvious faults. First, the government has maintained throughout this litigation that all detainees have been free to communicate with the outside world. Although there is significant evidence contradicting this contention, if the Government's sworn declaration on this point is correct, the detainees themselves could bring about most or all of the harms cited as reasons to block Petitioners' FOIA request. Indeed, with the passage of time, any terrorist associates of those detained would realize their detention, making it unlikely that disclosing this information to Petitioners would be harmful. *See Detroit Free Press v. Ashcroft*, 303 F.3d 681, 708 (6th Cir. 2002).

Second, the Government itself has, with some fanfare, released large amounts of information about other individuals who were directly linked to terrorist conspiracies.

By comparison, it is difficult to see what harm could arise from the release of information about individuals the Government has not even accused of terrorism connections. Although the court below suggested that this partial release of information could be part of a calculated strategy, no government official ever explained (or even referred to) such a strategy under oath. On the contrary, the Government's selective release of data at least suggests that it is willing to celebrate its successes but would rather hide its more questionable practices.

The Government's arguments only become weaker – and the lower court's decision more out of line with FOIA precedent – in light of the fact that it has indiscriminately offered these rationales for all of the detainees, including those never suspected of, or innocent of any connections to terrorism. Such generalizations are impermissible under FOIA, which requires that even where part of the requested material is exempt from disclosure, "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record . . . ." 5 U.S.C. § 552(b). As Judge Tatel noted, the courts have interpreted this provision to require the "government [to] divide [the] information it seeks to withhold into categories [that are] sufficiently distinct to allow a court to grasp how each . . . category of documents, if disclosed would interfere with its investigation." Pet. App. 40a-41a (quoting *Crooker*, 789 F.2d at 67) (internal quotation marks omitted; final two alterations in original). Indeed Judge Tatel, in remarking that the Government had released so much information about other individuals in its custody, questioned "why, particularly in light of FOIA's exacting standards, [the Government did not] make those distinctions in its exemption request before this court." Pet. App. 49a.

With respect to the cleared detainees, the first and fourth of the Government's rationales simply do not apply, because

they assume a link to terrorism. For example, the Government cannot explain how revealing the names of innocent persons – persons caught up in a broad sweep of arrests that targeted Middle Eastern men – would have led to them being intimidated by terrorist groups or, even more outlandishly, "allow[ed] terrorist organizations and others to interfere with the pending proceedings by creating false or misleading evidence."

The second and third rationales fare little better. The Government claims, for example, that it could not have released names (or names of counsel, or place of detention, etc.) for persons with no prior link to terrorism, because that would have compromised its ability to make them into informants after their release or deportation. In other words, the Government asserts that it has the right to detain persons innocent of serious wrongdoing and hide those detentions based on the hope that it can persuade the detainees to become undercover agents in the future. The Government never explained how likely or common this scenario was, or why it could not identify detainees who had no who had no plan to become informants – especially by the time of the District Court's ruling, months after most of the detainees had been released.

The third rationale – that disclosure could provide a roadmap of the government investigation – also provides little support for refusal to make a partial disclosure regarding the "innocent" detainees. Disclosure of names, if limited to persons previously unknown to terrorists, would tell them what they already knew – that the Government was interviewing thousands of foreign nationals and pursuing a multitude of public tips. Metaphors about "mosaics" should not be allowed to obscure this basic distinction.

It may be that the Government could have offered some justification for ignoring the distinction between suspected

and "innocent" detainees. But it did not try to do so. Even in the national security context, the courts should not paper over such a gap in the Government's evidence by endorsing the Government's effort to treat all the detainees as an undifferentiated group. FOIA requires the government to justify any withholding through a particularized showing. At a minimum that means that the government cannot rely on a blanket justification where that blanket does not fit everyone it purports to cover.

Nor should the courts disregard the significant countervailing interests at stake in this case. Petitioners had compelling reasons for inquiring into the circumstances under which a large number of citizens and foreign nationals – including many with no terrorist connections – found themselves caught up in a large scale dragnet. And there was reason to ask whether the Government, having indulged in such an immediate response to the terrorist attacks, was seeking to cover its tracks even as it reassured the public by announcing apprehensions of true suspects. In this regard the majority below should also have considered that arrests have never before been done in secret in this country, despite the many security concerns we have faced over the years. *See* pp. 27-28 *infra*; *Morrow v. District of Columbia*, 417 F.2d 728, 741-42 (D.C. Cir. 1969) ("'secret arrests' [are] a concept odious to a democratic society").

If the D.C. Circuit ruling is allowed to stand, it will send a disturbing signal that the executive branch is free to withhold even the most basic information about the individuals it has detained – most notably their names, their counsels' names, their dates of arrest and detention, and their places of detention – on the basis of nothing more than a patently unpersuasive invocation of national security concerns. FOIA is Congress's chosen approach to facilitating the public's fundamental interest in knowing "what its government is up to." *United States Dep't of Defense v.*

Federal Labor Relations Auth., 510 U.S. 487, 497 (1994). The D.C. Circuit has eviscerated the values of that statute, making it a paper tiger in the face of a regime of secret arrests. At a time when thoughtful reasoning is more necessary than ever to avoid unwarranted intrusions into civil liberties, this Court should hear this case to restore those values. As the District Court here put it, "the first priority of the judicial branch must be to ensure that our Government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship." Pet. App. 66a.

II. THE COURT OF APPEALS ERRED IN FAILING TO RECOGNIZE THAT THE FIRST AMENDMENT PROHIBITS SECRET ARRESTS AND DETENTIONS, EXCEPT IN THE MOST COMPELLING CIRCUMSTANCES.

In the District Court, the Government expressly acknowledged prior to any litigation in this case that it had a constitutional obligation to reveal the names of those detainees who were charged criminally, as well as the nature of the charges. *See* note 11 *supra*. The concession was correct, for it hardly makes sense to read the First Amendment as requiring public access to criminal trials and preliminary hearings but not creating at least a qualified right to know who is in custody on criminal charges awaiting such a public proceeding. The need for public scrutiny as a check on governmental abuse of the criminal process begins when a defendant is taken into custody and thus suffers a deprivation of liberty.

The Government, however, persuaded the majority below that the First Amendment is not implicated by secret arrests, unless and until criminal charges are filed. Pet. App. 28a. Indeed, the court would have limited the First Amendment right of access more narrowly than the

Government itself – limiting it to claims of access to criminal proceedings in open court. *Id.* at 30a. This Court should grant review here to determine whether that constitutional line makes any sense.

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the landmark case that found a public right of access to criminal trials, the Court focused on two considerations. 448 U.S. at 578-80. First, it examined whether there has traditionally been public access to criminal trials. *Id.* at 565-69. Second, it analyzed the purpose that public access serves in a democracy, finding that it helps ensure that the justice system appears fair and is fair. *Id.* at 570-72. The Court later converted these considerations into a "logic and experience" test and applied that test to hold that there is a right of public access to the preliminary hearing and voir dire phases of a criminal prosecution. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press Enterprise I*"); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press Enterprise II*").

Here, those two considerations both point toward a rule generally barring secret arrests and detentions. First, applying the logic prong, the fact that detainees may never be criminally charged makes *public* scrutiny of their detention more, not less vital. As the Sixth Circuit recently elaborated, political checks are the only restraint on the Government's awesome power to arrest and detain in such situations, and public access is therefore functionally essential. *Detroit Free Press*, 303 F.3d at 682-83. Alexander Hamilton noted this reality in the *Federalist Papers*:

> "To bereave a man of life . . . or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the

> person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government."

The Federalist No. 84, at 474-75 (Alexander Hamilton) (I. Kramnick ed. 1987).

Second, applying the experience prong, the traditions of this country strongly support a right of access to information about those who have been arrested. In the Anglo-American system of government, arrests have been public events since England abolished the infamous Star Chamber in 1641. Its system of secret arrests and trials had been a "means to introduce an arbitrary form of government." Act Abolishing the Star Chamber, II(4), *in Sources of our Liberties* 139 (Richard L. Perry ed. 1959). The Founders were aware of this history, viewing secrecy as an "instrument[] of [o]ld [w]orld tyranny." *United States Dep't of Justice v. Reporters Committee For Freedom of Press*, 489 U.S. 749, 772 (1989).

In modern times, police blotters, which include records of each person detained, have been public since they were first used. Moreover, throughout our history, concerns about sedition have not been treated as a justification for secret arrests. Arrests for violating the Alien and Sedition Acts were disclosed to the press. John C. Miller, *Crisis in Freedom: The Alien and Sedition Acts* 64-65, 99-100 & n.31 (1951). Arrests pursuant to the Alien Enemies Act, which gave the president power to detain any "dangerous" alien during the war of 1812, were decreed to be "public measures," by Justice Washington when riding circuit. *Lockington v. Smith*, 15 F. Cas. 758, 760 (C.C.D. Pa. 1817) (No. 8448). And during the Civil War, when Abraham Lincoln suspended the writ of habeas corpus, Congress insisted that the President furnish the Courts with a list of all persons held by his authority who were not prisoners of war.

An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, Mar. 3, 1863, 12 Stat. 755, ch. 81 § 2 (1863).

In sum, there is a strong argument that the Government exceeded constitutional bounds when it claimed complete immunity from constitutional scrutiny for its secret arrest and detention of the non-criminal detainees. To be sure, the First Amendment would not prevent the Government from seeking to persuade a court that a particular arrest and detention or group thereof needs to be secret for compelling reasons of national security. But for all the reasons set forth in Part I, it is unlikely such a showing could have been made for all, if any, of the detainees rounded up after September 11.

The only way to avoid these conclusions would be to accept the ruling of the majority below that the entire *Richmond Newspapers* analysis is categorically inapplicable to claims seeking access to information about arrests and detentions – or at a minimum is triggered only when detainees are criminally charged. But while the Court has never had occasion to rule that the *Richmond Newspapers* test applies outside the context of claims of access to hearings or trial in criminal prosecutions, it has likewise never refused to do so.[18]

Moreover, it is difficult to see any justification for barring application of *Richmond Newspapers* to a category

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[18]Certainly *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999), cited by the majority below, did not establish a rule that the First Amendment allows secret arrests and detentions. Although the Court did suggest in *dicta* that the government could constitutionally deny access to some information about arrestees, *id.* at 40, it did so in a case where the government claimed only the right to withhold access to arrestee addresses from commercial businesses intending to solicit criminal defendants and offer them their services.

of information where the *Richmond Newspapers* test, if applied, would itself support recognition of a right of access. That means, by definition, that the First Amendment considerations this Court has elaborated are in fact at stake. Thus, in discussing criminal trials in *Richmond Newspapers*, the Court noted that openness "gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged . . . the misconduct of participants, and decisions based on secret bias or partiality." 448 U.S. at 569 (citing M. Hale, *The History of the Common Law of England* 343-45 (6th ed. 1820); 3 W. Blackstone, *Commentaries* 372-73). Indeed, the Court noted Bentham's belief that, "Without publicity, all other checks [on government misconduct] are insufficient." *Id.* (quoting 1 J. Bentham, *Rationale of Judicial Evidence* 524 (1827)). In *Press Enterprise II*, the Court reiterated these sentiments. Some "proceedings plainly require public access," it said. 478 U.S. at 9. This is because disclosure "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Id.* (quoting *Press Enterprise I*, 464 U.S. at 501).

The very nature of detention underscores the need to apply to this case the same rigorous, yet balanced First Amendment standard that the Court applied to voir dire and preliminary hearings. *First*, detention, like the voir dire at issue in *Press Enterprise I*, and the preliminary hearing at issue in *Press Enterprise II*, is often a critical first step in the process by which society deals with those who violate our laws. *Second*, and more importantly, any detention of the kind involved here is a massive deprivation of one's liberty. Proceedings like a trial, voir dire, and the preliminary hearing are merely procedures for answering the underlying question raised whenever anyone is taken into custody – whether the deprivation is legitimate and should be continued. Where such procedural checks do not occur,

because the Government has the discretion to decide whether to institute the criminal charges that eventually trigger proceedings, the detainee has an even stronger interest in the safeguards that result from openness and the public has an even stronger interest in knowing how the power to detain is being exercised and in preventing abuses and misconduct. Indeed, that is the only way the public can get a complete picture of those whom the Government arrests but never criminally charges.

Application of the *Richmond Newspapers* test in this context would not mean that the First Amendment would become a free-floating constitutional version of the Freedom of Information Act. To the contrary, the qualified First Amendment right of access could sensibly be limited to those few additional contexts where the principles underlying *Richmond Newspapers* are just as applicable, if not more so – *i.e.*, to any governmental exercise of the power to detain, a power that is essential to our domestic security but also, as Hamilton put it, a uniquely "dangerous engine of arbitrary government" when exercised in secret.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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Appendix A

CENTER FOR NATIONAL SECURITY STUDIES, ET AL., APPELLANTS/CROSS-APPELLEES v. U.S. DEPARTMENT OF JUSTICE, APPELLEES/CROSS-APPELLANTS

No. 02-5254 & No. 02-5300

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

331 F.3d 918

November 18, 2002, Argued
June 17, 2003, Decided

JUDGES: Before: SENTELLE, HENDERSON and TATEL, Circuit Judges. Opinion for the Court filed by Circuit Judge SENTELLE. Dissenting opinion filed by Circuit Judge TATEL.

OPINION BY: SENTELLE

OPINION:

SENTELLE, Circuit Judge: Various "public interest" groups (plaintiffs) brought this Freedom of Information Act (FOIA) action against the Department of Justice (DOJ or government) seeking release of information concerning persons detained in the wake of the September 11 terrorist attacks, including: their names, their attorneys, dates of arrest and release, locations of arrest and detention, and reasons for detention. The government objected to release, and asserted numerous exceptions to FOIA requirements in order to justify

withholding the information. The parties filed cross-motions for summary judgment. The district court ordered release of the names of the detainees and their attorneys, but held that the government could withhold all other detention information pursuant to FOIA Exemption 7(A), which exempts "records or information compiled for law enforcement purposes . . . to the extent that the production" of them "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A) (2000). Attorneys filed cross-appeals. Upon *de novo* review, we agree with the district court that the detention information is properly covered by Exemption 7(A); but we further hold that Exemption 7(A) justifies withholding the names of the detainees and their attorneys. We also reject plaintiffs' alternate theories that the *First Amendment* and the common law mandate disclosure of the contested information. We therefore affirm in part, reverse in part, and remand the case to the district court for the entry of a judgment of dismissal.

I. Background

A. The Investigation

Consistent with the mutual decision of the parties to seek resolution to this controversy on summary judgment, the facts are not in serious dispute. In response to the terrorist attacks of September 11, 2001, President George W. Bush ordered a worldwide investigation into those attacks and into "threats, conspiracies, and attempts to perpetrate terrorist acts against United States citizens and interests." The Department of Justice, defendant in this action, has been conducting the investigation in conjunction with other federal, state and local agencies. The investigation continues today.

In the course of the post-September 11 investigation, the

government interviewed over one thousand individuals about whom concern had arisen. The concerns related to some of these individuals were resolved by the interviews, and no further action was taken with respect to them. Other interviews resulted in the interviewees being detained. As relevant here, these detainees fall into three general categories.

The first category of detainees consists of individuals who were questioned in the course of the investigation and detained by the INS for violation of the immigration laws (INS detainees). INS detainees were initially questioned because there were "indications that they might have connections with, or possess information pertaining to, terrorist activity against the United States including particularly the September 11 attacks and/or the individuals or organizations who perpetrated them." Based on the initial questioning, each INS detainee was determined to have violated immigration law; some of the INS detainees were also determined to "have links to other facets of the investigation." Over 700 individuals were detained on INS charges. As of June 13, 2002, only seventy-four remained in custody. Many have been deported. INS detainees have had access to counsel, and the INS has provided detainees with lists of attorneys willing to represent them, as required by 8 U.S.C. § 1229(b)(2) (2000). INS detainees have had access to the courts to file *habeas corpus* petitions. They have also been free to disclose their names to the public.

The second category of detainees consists of individuals held on federal criminal charges (criminal detainees). The government asserts that none of these detainees can be eliminated as a source of probative information until after the investigation is completed. According to the most recent information released by the Department of Justice, 134 individuals have been detained on federal criminal charges in the post-September 11 investigation; 99 of these have been

found guilty either through pleas or trials. While many of the crimes bear no direct connection to terrorism, several criminal detainees have been charged with terrorism-related crimes, and many others have been charged with visa or passport forgery, perjury, identification fraud, and illegal possession of weapons. Zacarias Moussaoui, presently on trial for participating in the September 11 attacks, is among those who were detained on criminal charges.

The third category consists of persons detained after a judge issued a material witness warrant to secure their testimony before a grand jury, pursuant to the material witness statute, 18 U.S.C. § 3144 (2000) (material witness detainees). Each material witness detainee was believed to have information material to the events of September 11. The district courts before which these material witnesses have appeared have issued sealing orders that prohibit the government from releasing any information about the proceedings. The government has not revealed how many individuals were detained on material witness warrants. At least two individuals initially held as material witnesses are now being held for alleged terrorist activity.

The criminal detainees and material witness detainees are free to retain counsel and have been provided court-appointed counsel if they cannot afford representation, as required by the Sixth Amendment to the Constitution. In sum, each of the detainees has had access to counsel, access to the courts, and freedom to contact the press or the public at large.

B. The Litigation

On October 29, 2001, plaintiffs submitted a FOIA request to the Department of Justice seeking the following information about each detainee: 1) name and citizenship status; 2) location

of arrest and place of detention; 3) date of detention/arrest, date any charges were filed, and the date of release; 4) nature of charges or basis for detention, and the disposition of such charges or basis; 5) names and addresses of lawyers representing any detainees; 6) identities of any courts which have been requested to enter orders sealing any proceedings in connection with any detainees, copies of any such orders, and the legal authorities relied upon by the government in seeking the sealing orders; 7) all policy directives or guidance issued to officials about making public statements or disclosures about these individuals or about the sealing of judicial or immigration proceedings. To support its FOIA request, plaintiffs cited press reports about mistreatment of the detainees, which plaintiffs claimed raised serious questions about "deprivations of fundamental due process, including imprisonment without probable cause, interference with the right to counsel, and threats of serious bodily injury."

In response to plaintiffs' FOIA request, the government released some information, but withheld much of the information requested. As to INS detainees, the government withheld the detainees' names, locations of arrest and detention, the dates of release, and the names of lawyers. As to criminal detainees, the government withheld the dates and locations of arrest and detention, the dates of release, and the citizenship status of each detainee. The government withheld all requested information with respect to material witnesses. Although the government has refused to disclose a comprehensive list of detainees' names and other detention information sought by plaintiffs, the government has from time to time publicly revealed names and information of the type sought by plaintiffs regarding a few individual detainees, particularly those found to have some connection to terrorism.

On December 5, 2001, plaintiffs filed this action in district

court seeking to compel release of the withheld information pursuant to the Freedom of Information Act, *5 U.S.C. § 552*. Plaintiffs also argued that the *First Amendment*, as interpreted in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980) and its progeny, and the common law doctrine of access to public records require the government to disclose the names and detention information of the detainees.

The parties filed cross-motions for summary judgment. In its motion, the government contended that FOIA Exemptions 7(A), 7(C), and 7(F), 5 U.S.C. § 552(b)(7)(A), (C) & (F), allow the government to withhold the requested documents as to all three categories of detainees. These exemptions permit withholding information "compiled for law enforcement purposes" whenever disclosure:

> (A) could reasonably be expected to interfere with enforcement proceedings, . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, . . . or (F) could reasonably be expected to endanger the life or physical safety of any individual.

5 U.S.C. § 552(b)(7)(A), (C), (F). As to the material witness detainees, the government also invoked Exemption 3, 5 U.S.C. § 552(b)(3), which exempts from FOIA requirements matters that are "specifically exempted from disclosure by [other statutes] . . .," contending that Federal Rule of Criminal Procedure 6(e), which limits the disclosure of grand jury matters, bars the release of information concerning material witnesses.

In support of its motion, the government submitted affidavits from James Reynolds, Director of the Terrorism and

Violent Crime Section of the Department of Justice, and Dale Watson, FBI Executive Assistant Director for Counterterrorism -- officials with central responsibility for the ongoing terrorist investigation. *See* Reynolds Decl., Reynolds Supp. Decl., Reynolds Second Supp. Decl., and Watson Decl.

As to Exemption 7(A), the declarations state that release of the requested information could hamper the ongoing investigation by leading to the identification of detainees by terrorist groups, resulting in terrorists either intimidating or cutting off communication with the detainees; by revealing the progress and direction of the ongoing investigation, thus allowing terrorists to impede or evade the investigation; and by enabling terrorists to create false or misleading evidence. As to Exemption 7(C), the declarations assert that the detainees have a substantial privacy interest in their names and detention information because release of this information would associate detainees with the September 11 attacks, thus injuring detainees' reputations and possibly endangering detainees' personal safety. Finally, as to Exemption 7(F), the government's declarations contend that release of the information could endanger the public safety by making terrorist attacks more likely and could endanger the safety of individual detainees by making them more vulnerable to attack from terrorist organizations. For these same reasons, the counterterrorism officials state that the names of the detainees' lawyers should also be withheld.

C. The Judgment

On August 2, 2002, the district court rendered its decision, ruling in part for the plaintiffs and in part for the government. *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002) (*CNSS*). Briefly put, the court ordered the government to disclose the names of the detainees

and detainees' lawyers, but held that the government was entitled to withhold all other detention information under Exemptions 7(A) and 7(F). *Id.* at 113.

Addressing the names of the detainees, the court held that disclosure could not reasonably be expected to interfere with ongoing enforcement proceedings, and thus the names were not exempt under 7(A). The court rejected the government's argument that disclosure of detainees' names would deter them from cooperating with the government because terrorist groups likely already know which of their cell members have been detained. *Id.* at 101. Moreover, the court reasoned that the government's voluntary disclosure of the names of several detainees undermined the force of its argument about the harms resulting from disclosure. *Id.* at 101-02. The court further held that "the government has not met its burden of establishing a 'rational link' between the harms alleged and disclosure" because its declarations provided no evidence that the detainees actually have any connection to, or knowledge of, terrorist activity. *Id.* at 102 (quoting *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, 252 U.S. App. D.C. 232, 789 F.2d 64, 67 (D.C. Cir. 1986)).

The court next rejected the government's 7(A) argument that disclosure of names would allow terrorist groups to map the course of, and thus impede, its investigation. *Id.* at 103. The government had advanced a "mosaic" argument, contending that the court should consider the aggregate release of the names under 7(A) rather than the release of each in isolation, on the reasoning that the release of the names *in toto* could assist terrorists in piecing together the course, direction and focus of the investigation. *Id.* at 103. The district court rejected this argument, holding, *inter alia*, as a matter of law that FOIA Exemption 7(A) requires an individualized assessment of disclosure, and that the government's mosaic theory could not

justify a blanket exclusion of information under Exemption 7(A). *Id.* at 103-04. In the district court's view, the mosaic theory is only cognizable under *Exemption 1*, which protects information authorized by Executive Order to be kept secret in the interest of national defense or foreign policy. *Id.* The court further rejected the government's final 7(A) argument, concluding that there was insufficient evidence that disclosure would enable terrorist groups to create false and misleading evidence. *Id.* at 104-05.

Turning to Exemptions 7(C) and 7(F), the court rejected the government's claims, holding that the admittedly substantial privacy and safety interests of the detainees do not outweigh the vital public interest in ensuring that the government is not abusing its power. *Id.* at 105-06. The court noted that plaintiffs have raised "grave concerns" about the mistreatment of detainees and have provided evidence of alleged mistreatment in the form of media reports, and firsthand accounts given to Congress and human rights groups. *Id.* at 105 & n.17. While rejecting the government's attempt to withhold detainees' names, the court ruled that it would permit detainees to opt out of disclosure by submitting a signed declaration within fifteen days. *Id.* at 106. The court did not address the government's argument that disclosure could harm public safety.

Having rejected the government's Exemption 7 claims, the court further held that Exemption 3 does not bar the release of the names of material witnesses. *Id.* at 106-07. Specifically, the court held that Exemption 3 does not apply, reasoning Federal Rule of Criminal Procedure 6(e) does not bar the disclosure of the identities of persons detained as material witnesses, but only bars "disclosure of a matter occurring before a grand jury." Fed. R. Crim. P. 6(e)(6). The government's evidence did not establish that any of the detainees were actual grand jury

witnesses or were scheduled to testify before a grand jury. Further, the government's disclosure of the identities of twenty-six material witness detainees undercut its argument that disclosure is barred by statute. 215 F. Supp. 2d at 106-07. As to the government's contention that court sealing orders prevent the government from releasing the names of material witnesses, the court ordered the government to submit such orders for *in camera* review or to submit a "supplemental affidavit explaining the nature and legal basis for these sealing orders." *Id.* at 108.

For reasons not unlike its rejection of the government's attempt to withhold the names of detainees, the court also held that the government must reveal the names of the detainees' lawyers.[1] The court determined that the names of the attorneys were not covered by Exemptions 7(A), 7(C), or 7(F) for the same reason it had rejected the government's attempt to withhold the names of detainees; because attorneys have no expectation of anonymity; and because any concerns about physical danger were purely speculative. *Id.* at 109.

Turning to the other information sought by plaintiffs -- the dates and locations of arrest, detention, and release -- the court granted summary judgment for the government on its claim that such detention information was covered under 7(A) and 7(F). *Id.* at 108. The court credited the counterterrorism officials' judgment that the detention information "would be particularly valuable to anyone attempting to discern patterns in the Government's investigation and strategy," and that disclosure would make detention facilities "vulnerable to

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[1]The government has withheld the names of the attorneys for both INS detainees and material witness detainees; it has revealed the names of the attorneys for the criminally charged detainees.

retaliatory attacks." *Id.* Finally, the court rejected plaintiffs' claim that the *First Amendment* and common law entitle them to the dates and locations of arrest, detention, and release. *Id.* at 111-12.

The court ordered the government to release the names of detainees and their lawyers in fifteen days, subject to the right of detainees to opt out of disclosure. *Id.* at 113-14. On August 15, 2002, the district court stayed its order pending appeal. The government timely appealed. Plaintiffs cross-appealed the district court's ruling that the detention information was properly withheld and the district court's ruling that detainees could opt out of disclosure. The appeals were consolidated.

II. The FOIA Claims

We review *de novo* the district court's grant of summary judgment, *Johnson v. Executive Office for United States Attorneys*, 310 F.3d 771, 774 (D.C. Cir. 2002), and therefore consider anew each of the claims and defenses advanced before the district court. We turn first to the government's claims of exemption from disclosure under FOIA of the names of the detainees and their lawyers.

A. Names of Detainees

"Public access to government documents" is the "fundamental principle" that animates FOIA. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151, 107 L. Ed. 2d 462, 110 S. Ct. 471 (1989). "Congress recognized, however, that public disclosure is not always in the public interest." *CIA v. Sims*, 471 U.S. 159, 166-67, 85 L. Ed. 2d 173, 105 S. Ct. 1881 (1985). Accordingly, FOIA represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information

confidential. *John Doe Agency*, 493 U.S. at 152. To that end, FOIA mandates disclosure of government records unless the requested information falls within one of nine enumerated exemptions, *see* 5 U.S.C. § 552(b). While these exemptions are to be "narrowly construed," *FBI v. Abramson*, 456 U.S. 615, 630, 72 L. Ed. 2d 376, 102 S. Ct. 2054 (1982), courts must not fail to give them "a meaningful reach and application," *John Doe Agency*, 493 U.S. at 152. The government bears the burden of proving that the withheld information falls within the exemptions it invokes. 5 U.S.C. § 552(a)(4)(B).

The government invokes four exemptions -- 7(A), 7(C), 7(F), and 3 -- to shield the names of detainees from disclosure. Upon review, we hold that Exemption 7(A) was properly invoked to withhold the names of the detainees and their lawyers. Finding the names protected under 7(A), we need not address the other exemptions invoked by the government and reserve judgment on whether they too would support withholding the names.

Exemption 7(A) allows an agency to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). In enacting this exemption, "Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 232, 57 L. Ed. 2d 159, 98 S. Ct. 2311 (1978). *Exemption 7(A)* does not require a presently pending "enforcement proceeding." Rather, as the district court correctly noted, it is sufficient that the government's ongoing September 11 terrorism investigation is likely to lead to such proceedings. *See* CNSS, 215 F. Supp. 2d at 101 n.9 (citing

Bevis v. Dep't of State, 255 U.S. App. D.C. 347, 801 F.2d 1386 (D.C. Cir. 1986)).

The threshold question here is whether the names of detainees were "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). Because the DOJ is an agency "specializing in law enforcement," its claim of a law enforcement purpose is entitled to deference. *Campbell v. United States DOJ*, 334 U.S. App. D.C. 20, 164 F.3d 20, 32 (D.C. Cir. 1998); *Quinon v. FBI*, 318 U.S. App. D.C. 228, 86 F.3d 1222, 1228 (D.C. Cir. 1996); *Pratt v. Webster*, 218 U.S. App. D.C. 17, 673 F.2d 408, 419 (D.C. Cir. 1982). To establish a law enforcement purpose, DOJ's declarations must establish (1) "a rational nexus between the investigation and one of the agency's law enforcement duties;" and (2) "a connection between an individual or incident and a possible security risk or violation of federal law." *Campbell*, 164 F.3d at 32 (citations and quotations omitted); *see also Quinon*, 86 F.3d at 1228. The government's proffer easily meets this standard. The terrorism investigation is one of DOJ's chief "law enforcement duties" at this time, *see* Reynolds Decl. P 2, and the investigation concerns a heinous violation of federal law as well as a breach of this nation's security. Moreover, the names of the detainees and their connection to the investigation came to the government's attention as a result of that law enforcement investigation. Reynolds Decl. PP 2-5.

Nonetheless, plaintiffs contend that detainees' names fall outside Exemption 7 because the names are contained in arrest warrants, INS charging documents, and jail records. Since these documents have traditionally been public, plaintiffs contend, Exemption 7 should not be construed to allow withholding of the names. We disagree. Plaintiffs are seeking a comprehensive listing of individuals detained during the post-September 11 investigation. The names have been compiled for

the "law enforcement purpose" of successfully prosecuting the terrorism investigation. As compiled, they constitute a comprehensive diagram of the law enforcement investigation after September 11. Clearly this is information compiled for law enforcement purposes.

Next, plaintiffs urge that Exemption 7(A) does not apply because disclosure is not "reasonably likely to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). We disagree. Under Exemption 7(A), the government has the burden of demonstrating a reasonable likelihood of interference with the terrorism investigation. The government's declarations, viewed in light of the appropriate deference to the executive on issues of national security, satisfy this burden.

It is well-established that a court may rely on government affidavits to support the withholding of documents under FOIA exemptions, *King v. United States Dep't of Justice*, 265 U.S. App. D.C. 62, 830 F.2d 210, 217 (D.C. Cir. 1987), and that we review the government's justifications therein *de novo*, 5 U.S.C. § 552(a)(4)(B); *Summers v. Dep't of Justice*, 329 U.S. App. D.C. 358, 140 F.3d 1077, 1080 (D.C. Cir. 1998). It is equally well-established that the judiciary owes some measure of deference to the executive in cases implicating national security, a uniquely executive purview. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 696, 150 L. Ed. 2d 653, 121 S. Ct. 2491 (2001) (noting that "terrorism or other special circumstances" might warrant "heightened deference to the judgments of the political branches"); *Dep't of the Navy v. Egan*, 484 U.S. 518, 530, 98 L. Ed. 2d 918, 108 S. Ct. 818 (1988) ("courts traditionally have been reluctant to intrude upon the authority of the executive in military and national security affairs"). Indeed, both the Supreme Court and this Court have expressly recognized the propriety of deference to the executive in the context of FOIA claims which implicate national security.

In *CIA v. Sims*, 471 U.S. 159, 85 L. Ed. 2d 173, 105 S. Ct. 1881 (1985), the Supreme Court examined the CIA's claims that the names and institutional affiliations of certain researchers in a government-sponsored behavior modification program were exempt from disclosure under FOIA Exemption 3, 5 U.S.C. § 552(b)(3). *Id.* at 163-64. The agency claimed that the information was protected from disclosure by a statute charging the CIA to prevent unauthorized disclosure of "intelligence sources and methods," 50 U.S.C. § 403(d)(3). In accepting the CIA Director's judgment that disclosure would reveal intelligence sources and methods, the Court explained that "the decisions of the Director, who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake." *Sims*, 471 U.S. at 179. The Court further held that "it is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of subtle and complex factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." *Id.* at 180.

The same is true of the Justice Department officials in charge of the present investigation. We have consistently reiterated the principle of deference to the executive in the FOIA context when national security concerns are implicated. In *McGehee v. Casey*, we examined the standard of review for FOIA requests of classified documents. 231 U.S. App. D.C. 99, 718 F.2d 1137, 1148 (D.C. Cir. 1983). We observed:

> Courts are to "accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record" because "the Executive departments responsible for national defense and foreign policy matters have unique

> insights into what adverse affects [sic] might occur as a result of a particular classified record."

Id. (quoting S. Rep. No. 1200, 93d Cong., 2d Sess. 12, U.S.C.C.A.N. 1974, p. 6267 (1974) (Conference Report on the FOIA Amendments)). Moreover, in the FOIA context, we have consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review. *See, e.g.*, King, 830 F.2d at 217 ("the court owes substantial weight to detailed agency explanations in the national security context"); *Gardels v. CIA*, 223 U.S. App. D.C. 88, 689 F.2d 1100, 1104 (D.C. Cir. 1982) ("Once satisfied that proper procedures have been followed and that the information logically falls into the exemption claimed, the courts need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith."); *Halperin v. CIA*, 203 U.S. App. D.C. 110, 629 F.2d 144, 148 (D.C. Cir. 1980); *Weissman v. CIA*, 184 U.S. App. D.C. 117, 565 F.2d 692, 697-98 (D.C. Cir. 1977).

Given this weight of authority counseling deference in national security matters, we owe deference to the government's judgments contained in its affidavits. Just as we have deferred to the executive when it invokes FOIA Exemptions 1 and 3, we owe the same deference under Exemption 7(A) in appropriate cases, such as this one. *Id.* Plaintiffs provide no valid reason why the general principle of deference to the executive on national security issues should apply under FOIA Exemption 3, as in *Sims* and *Halperin*, and Exemption 1, as in our earlier cases, but not under Exemption 7(A). Nor can we can conceive of any reason to limit deference to the executive in its area of expertise to certain FOIA exemptions so long as the government's declarations raise legitimate concerns that disclosure would impair national security.

The need for deference in this case is just as strong as in earlier cases. America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore. Exemption 7(A) explicitly requires a predictive judgment of the harm that will result from disclosure of information, permitting withholding when it "could reasonably be expected" that the harm will result. 5 U.S.C. § 552(b)(7)(A). It is abundantly clear that the government's top counterterrorism officials are well-suited to make this predictive judgment. Conversely, the judiciary is in an extremely poor position to second-guess the executive's judgment in this area of national security. *Cf. Krikorian v. Dep't of State*, 299 U.S. App. D.C. 331, 984 F.2d 461, 464 (D.C. Cir. 1993) (quoting *Halperin*, 629 F.2d at 148) ("Judges . . . lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case."). We therefore reject any attempt to artificially limit the long-recognized deference to the executive on national security issues. Judicial deference depends on the substance of the danger posed by disclosure -- that is, harm to the national security -- not the FOIA exemption invoked.

In light of the deference mandated by the separation of powers and Supreme Court precedent, we hold that the government's expectation that disclosure of the detainees' names would enable al Qaeda or other terrorist groups to map the course of the investigation and thus develop the means to impede it is reasonable. A complete list of names informing terrorists of every suspect detained by the government at any point during the September 11 investigation would give terrorist organizations a composite picture of the government investigation, and since these organizations would generally know the activities and locations of its members on or about September 11, disclosure would inform terrorists of both the substantive and geographic focus of the investigation.

Moreover, disclosure would inform terrorists which of their members were compromised by the investigation, and which were not. This information could allow terrorists to better evade the ongoing investigation and more easily formulate or revise counter-efforts. In short, the "records could reveal much about the focus and scope of the [agency's] investigation, and are thus precisely the sort of information exemption 7(A) allows an agency to keep secret." *Swan v. SEC*, 321 U.S. App. D.C. 8, 96 F.3d 498, 500 (D.C. Cir. 1996).

As the district court noted, courts have relied on similar mosaic arguments in the context of national security. *CNSS*, 215 F. Supp. 2d at 103 & n.13. In *Sims*, for example, the Supreme Court cautioned that "bits and pieces" of data "'may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself.'" 471 U.S. at 178 (quoting *Halperin*, 629 F.2d at 150). Thus, "what may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." *Id.* (quotations omitted). Such a danger is present here. While the name of any individual detainee may appear innocuous or trivial, it could be of great use to al Qaeda in plotting future terrorist attacks or intimidating witnesses in the present investigation. *Cf. United States v. Yunis*, 276 U.S. App. D.C. 1, 867 F.2d 617, 623 (D.C. Cir. 1989) ("things that did not make sense to the District Judge would make all too much sense to a foreign counter-intelligence specialist who could learn much about this nation's intelligence-gathering capabilities from what these documents revealed about sources and methods."). Importantly, plaintiffs here do not request "bits and pieces" of information, but rather seek the names of every single individual detained in the course of the government's terrorism investigation. It is more than reasonable to expect that disclosing the name of every individual detained in the post-

September 11 terrorism investigation would interfere with that investigation.

Similarly, the government's judgment that disclosure would deter or hinder cooperation by detainees is reasonable. The government reasonably predicts that if terrorists learn one of their members has been detained, they would attempt to deter any further cooperation by that member through intimidation, physical coercion, or by cutting off all contact with the detainee. A terrorist organization may even seek to hunt down detainees (or their families) who are not members of the organization, but who the terrorists know may have valuable information about the organization.

On numerous occasions, both the Supreme Court and this Court have found government declarations expressing the likelihood of witness intimidation and evidence tampering sufficient to justify withholding of witnesses' names under Exemption 7(A). *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 239-42, 57 L. Ed. 2d 159, 98 S. Ct. 2311 (1978) (allowing withholding pursuant to Exemption 7(A) based on the risk of witness intimidation that would attend releasing witness statements prior to NLRB proceedings); *Alyeska Pipeline Serv. Co. v. EPA*, 272 U.S. App. D.C. 355, 856 F.2d 309, 312-13 (D.C. Cir. 1988) (upholding 7(A) claim based on government declaration that disclosure would enable corporation under investigation to intimidate or coerce informing employees); *accord Mapother v. Dep't of Justice*, 303 U.S. App. D.C. 249, 3 F.3d 1533, 1542-43 (D.C. Cir. 1993) (recognizing that government affidavits predicting witness intimidation and evidence fabrication "have achieved recognition in Exemption 7 caselaw"); *Manna v. Dep't of Justice*, 51 F.3d 1158, 1165 (3d Cir. 1995) (allowing withholding of names of all "interviewees, informants, [and] witnesses" in criminal investigation based on fears of

retaliation from organized crime). Most recently, we addressed in *Swan* a FOIA request that would have resulted in the disclosure of, *inter alia*, the identities of witnesses in an SEC investigation. 96 F.3d at 499. The SEC's declaration alleged that disclosure would risk allowing the subjects of the investigation to "intimidate witnesses, manufacture favorable evidence, and conceal damaging evidence." *Id.* We accepted the SEC's declaration and allowed the documents to be withheld. *Id.* at 499, 500. The risks of witness intimidation and evidence tampering alleged here are at least as great as those in *Swan* and our other precedents. We see no reason to assume that terrorists are less likely to intimidate the detainees here than were the subjects of the SEC investigation in *Swan*. Consequently, we hold that disclosure of detainees' names could "reasonably be expected to interfere" with the ongoing terrorism investigation.

For several reasons, plaintiffs contend that we should reject the government's predictive judgments of the harms that would result from disclosure. First, they argue that terrorist organizations likely already know which of their members have been detained. We have no way of assessing that likelihood. Moreover, even if terrorist organizations know about some of their members who were detained, a complete list of detainees could still have great value in confirming the status of their members. *Cf. Gardels*, 689 F.2d at 1105 (rejecting a similar argument in the FOIA national security context and stating that "official acknowledgment ends all doubt and gives the foreign organization a firmer basis for its own strategic or tactical response."). For example, an organization may be unaware of a member who was detained briefly and then released, but remains subject to continuing government surveillance. Reynolds Supp. Decl. PP 3, 5. After disclosure, this detainee could be irreparably compromised as a source of information.

More importantly, some detainees may not be members of terrorist organizations, but may nonetheless have been detained on INS or material witness warrants as having information about terrorists. Terrorist organizations are less likely to be aware of such individuals' status as detainees. Such detainees could be acquaintances of the September 11 terrorists, or members of the same community groups or mosques. *See* Rachel L. Swarns, *Oregon Muslims Protest Monthlong Detention Without a Charge*, N.Y. TIMES, April 20, 2003, at A16 (describing material witness detainee who attended same mosque as indicted terrorism suspects). These detainees, fearing retribution or stigma, would be less likely to cooperate with the investigation if their names are disclosed. Moreover, tracking down the background and location of these detainees could give terrorists insights into the investigation they would otherwise be unlikely to have. After disclosure, terrorist organizations could attempt to intimidate these detainees or their families, or feed the detainees false or misleading information. It is important to remember that many of these detainees have been released at this time and are thus especially vulnerable to intimidation or coercion. While the detainees have been free to disclose their names to the press or public, it is telling that so few have come forward, perhaps for fear of this very intimidation.

We further note the impact disclosure could have on the government's investigation going forward. A potential witness or informant may be much less likely to come forward and cooperate with the investigation if he believes his name will be made public. *Cf. Sims*, 471 U.S. at 172 (noting Congress's concern that intelligence sources will "close up like a clam" unless the government maintains complete confidentiality); *Manna*, 51 F.3d at 1165 ("disclosure . . . could result in a chilling effect upon potential cooperators and witnesses").

Plaintiffs next argue that the government's predictive judgment is undermined by the government's disclosure of some of the detainees' names. The Supreme Court confronted a similar argument in *Sims*, in which respondents contended that "because the Agency has already revealed the names of many of the institutions at which [behavior modification] research was performed, the Agency is somehow estopped from withholding the names of others." 471 U.S. at 180. In rejecting the argument, the Court stated that "this suggestion overlooks the political realities of intelligence operations in which, among other things, our Government may choose to release information deliberately to 'send a message' to allies or adversaries." *Id.* We likewise reject the plaintiffs' version of this discredited argument. The disclosure of a few pieces of information in no way lessens the government's argument that complete disclosure would provide a composite picture of its investigation and have negative effects on the investigation. Furthermore, as the *Sims* Court recognized, strategic disclosures can be important weapons in the government's arsenal during a law enforcement investigation. *Id.* ("The national interest sometimes makes it advisable, or even imperative, to disclose information that may lead to the identity of intelligence sources."). The court should not second-guess the executive's judgment in this area. "It is the responsibility of the [executive] not that of the judiciary" to determine when to disclose information that may compromise intelligence sources and methods. Id.

Contrary to plaintiffs' claims, the government's submissions easily establish an adequate connection between both the material witness and the INS detainees and terrorism to warrant full application of the deference principle. First, all material witness detainees have been held on warrants issued by a federal judge pursuant to 18 U.S.C. § 3144. Reynolds Decl. P 4. Under this statute, a federal judge may issue a

material witness warrant based on an affidavit stating that the witness has information relevant to an ongoing criminal investigation. Consequently, material witness detainees have been found by a federal judge to have relevant knowledge about the terrorism investigation. It is therefore reasonable to assume that disclosure of their names could impede the government's use of these potentially valuable witnesses.

As to the INS detainees, the government states that they were

> originally questioned because there were indications that they might have connections with, or possess information pertaining to, terrorist activity against the United States including particularly the September 11 attacks and/or the individuals and organizations who perpetrated them. For example, they may have been questioned because they were identified as having interacted with the hijackers, or were believed to have information relating to other aspects of the investigation.

Reynolds Decl. P 10. "Other INS detainees may have been questioned because of their association with an organization believed to be involved in providing material support to terrorist organizations." Watson Decl. P 8. Moreover, "in the course of questioning them, law enforcement agents determined, often from the subjects themselves, that they were in violation of federal immigration laws, and, in some instances also determined that they had links to other facets of the investigation." Reynolds Decl. P 10; Watson Decl. P 8. Furthermore, the Watson Declaration speaks of the INS detainees being subject to "public hearings involving evidence about terrorist links," P 16, and states that "concerns remain" about links to terrorism, P 19. The clear import of the declarations is that many of the detainees have links to

terrorism. This comes as no surprise given that the detainees were apprehended during the course of a terrorism investigation, and given that several detainees have been charged with federal terrorism crimes or held as enemy combatants. Accordingly, we conclude that the evidence presented in the declarations is sufficient to show a rational link between disclosure and the harms alleged.

In support of this conclusion, we note that the Third Circuit confronted a similar issue involving the INS detainees when it considered the constitutionality of closed deportation hearings in *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 155 L. Ed. 2d 1106, 123 S. Ct. 2215 (2003). The court was faced with the same Watson Declaration in evidence here and the same government prediction that harm would result from the disclosure of information about the INS detainees. *See id.* at 218. That court acknowledged that the "representations of the Watson Declaration are to some degree speculative." *Id.* at 219. But the court did not search for specific evidence that each of the INS detainees was involved in terrorism, nor did it embark on a probing analysis of whether the government's concerns were well-founded. *Id.* Rather, it was "quite hesitant to conduct a judicial inquiry into the credibility of these security concerns, as national security is an area where courts have traditionally extended great deference to Executive expertise." *Id.* The court concluded: "To the extent that the Attorney General's national security concerns seem credible, we will not lightly second-guess them." *Id.* We think the Third Circuit's approach was correct and we follow it here. Inasmuch as the concerns expressed in the government's declarations seem credible--and inasmuch as the declarations were made by counterterrorism experts with far greater knowledge than this Court--we hold that the disclosure of the names of the detainees could reasonably be expected to interfere with the ongoing

investigation.

In upholding the government's invocation of Exemption 7(A), we observe that we are in accord with several federal courts that have wisely respected the executive's judgment in prosecuting the national response to terrorism. *See Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) (dismissing the *habeas corpus* petition of a United States citizen captured in Afghanistan challenging his military detention and designation as an enemy combatant); *Global Relief Found. v. O'Neill*, 315 F.3d 748 (7th Cir. 2002) (upholding against constitutional challenge a portion of the USA PATRIOT Act, 50 U.S.C. § 1702(c), which authorizes the *ex parte* use of classified evidence in proceedings to freeze the assets of terrorist organizations); *North Jersey Media Group*, 308 F.3d 198 (holding that closure of "special interest" deportation hearings involving INS detainees with alleged connections to terrorism does not violate the First Amendment); *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (reversing district court's order that allowed alleged enemy combatant unmonitored access to counsel). We realize that not all courts are in agreement. In *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002), the Sixth Circuit acknowledged the necessity of deferring to the executive on terrorism issues but held that the First Amendment prohibits a blanket closure of "special interest deportation hearings." We do not find the Sixth Circuit's reasoning compelling, but join the Third, Fourth, and Seventh Circuits in holding that the courts must defer to the executive on decisions of national security. In so deferring, we do not abdicate the role of the judiciary. Rather, in undertaking a deferential review we simply recognize the different roles underlying the constitutional separation of powers. It is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of the courts to second-guess executive judgments made in

furtherance of that branch's proper role. The judgment of the district court ordering the government to disclose the names of the detainees is reversed.

B. Identity of Counsel

We next address whether the government properly withheld the names of the attorneys for INS and material witness detainees under Exemptions 7(A), 7(C), and 7(F). As with the identities of the detainees, we hold that their attorneys' names are also protected from disclosure by Exemption 7(A).

The government contends that a list of attorneys for the detainees would facilitate the easy compilation of a list of all detainees, and all of the dangers flowing therefrom. It is more than reasonable to assume that plaintiffs and *amici* press organizations would attempt to contact detainees' attorneys and compile a list of all detainees. As discussed above, if such a list fell into the hands of al Qaeda, the consequences could be disastrous. Having accepted the government's predictive judgments about the dangers of disclosing a comprehensive list of detainees, we also defer to its prediction that disclosure of attorneys' names involves the same danger. *Cf. Sims*, 471 U.S. at 179-80 (upholding under FOIA Exemption 3 the government's withholding of the institutional affiliations of researchers in a secret government program; deferring to government's judgment that disclosure would lead to identification of the researchers themselves and the consequent loss of confidential intelligence sources).

C. Other Detention Information

Having held that the government properly withheld the names of the detainees pursuant to Exemption 7(A), we easily affirm the portion of the district court's ruling that allowed

withholding, under Exemption 7(A), of the more comprehensive detention information sought by plaintiffs.

As outlined above, *supra* at 5, plaintiffs sought the dates and locations of arrest, detention, and release for each of the detainees. Even more than disclosure of the identities of detainees, the information requested here would provide a complete roadmap of the government's investigation. Knowing when and where each individual was arrested would provide a chronological and geographical picture of the government investigation. Terrorists could learn from this information not only where the government focused its investigation but how that investigation progressed step by step. Armed with that knowledge, they could then reach such conclusions as, for example, which cells had been compromised, and which individuals had been cooperative with the United States. They might well be able to derive conclusions as to how more adequately secure their clandestine operations in future terrorist undertakings. Similarly, knowing where each individual is presently held could facilitate communication between terrorist organizations and detainees and the attendant intimidation of witnesses and fabrication of evidence. As explained in detail above, these impediments to an ongoing law enforcement investigation are precisely what Exemption 7(A) was enacted to preclude. Accordingly, we affirm the district court and hold that the government properly withheld information about the dates and locations of arrest, detention, and release for each detainee.

III. Alternative Grounds

We turn now to plaintiffs' alternative grounds for seeking disclosure of the detainees' names and detention information. Although FOIA does not mandate disclosure, plaintiffs contend that disclosure is independently required by both the First

Amendment and the common law right of access to government information. We address these contentions in turn, and conclude that neither is meritorious.

A. The First Amendment

As outlined above, the government voluntarily released the names of all criminally charged detainees. Therefore, as in its FOIA request, plaintiffs seek the names of INS and material witness detainees, and the dates and location of arrest, detention, and release for all detainees. Plaintiffs characterize the information they seek as "arrest records," and contend that the public has a right of access to arrest records under the First Amendment, as interpreted in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980). We disagree. Plaintiffs seek not individual arrest records, but a comprehensive listing of the individuals detained in connection with a specified law enforcement investigation as well as investigatory information about where and when each individual was arrested, held, and released. The narrow First Amendment right of access to information recognized in *Richmond Newspapers* does not extend to non-judicial documents that are not part of a criminal trial, such as the investigatory documents at issue here.

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. In accord with its plain language, the First Amendment broadly protects the freedom of individuals and the press to speak or publish. It does not expressly address the right of the public to receive information. Indeed, in contrast to FOIA's statutory presumption of disclosure, the First Amendment does not "mandate[ ] a right of access to government information or sources of information within the government's control." *Houchins v. KQED*, 438 U.S. 1, 15, 57

L. Ed. 2d 553, 98 S. Ct. 2588 (1978) (plurality opinion); *id.* at 16 (Stewart, J., concurring in the judgment) (the First Amendment "does not guarantee the public a right of access to information generated or controlled by the government"). Thus, as the Court explained in *Houchins*: "the public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act." *Id.* at 14 (quoting Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 636 (1975)). Rather, disclosure of government information generally is left to the "political forces" that govern a democratic republic. *Id.* at 14-15.

Two years after *Houchins*, the Court recognized a limited *First Amendment* right of access to a criminal trial. *See Richmond Newspaper*s, 448 U.S. 555, 65 L. Ed. 2d 973, 100 S. Ct. 2814. In *Richmond Newspapers*, the Court explained that the *First Amendment* "was enacted against the backdrop of the long history of trials being historically open" and thus incorporated the notion of public access to criminal trials. *Id.* at 576-77. The Court expanded this limited right somewhat in the years after *Richmond Newspapers*. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 78 L. Ed. 2d 629, 104 S. Ct. 819 (1984) (*Press-Enterprise I*) (holding that the public has a First Amendment right to attend *voir dire* examinations during criminal trial); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 92 L. Ed. 2d 1, 106 S. Ct. 2735 (1986) (*Press-Enterprise II*) (holding that the public has a First Amendment right to access transcripts of adversarial preliminary hearings that occur prior to a criminal trial). In *Press-Enterprise II*, the Supreme Court first articulated what has come to be known as the *Richmond Newspapers* "experience and logic" test, by which the Court determines whether the public has a right of access to "criminal proceedings":

> First, because a tradition of accessibility implies the favorable judgment of experience, we have considered whether the place and process have historically been open to the press and general public . . . Second, in this setting the Court has traditionally considered whether public access plays a significant positive role in the functioning of the particular process in question.

Id. at 8 (citations omitted).

Neither the Supreme Court nor this Court has applied the *Richmond Newspapers* test outside the context of criminal judicial proceedings or the transcripts of such proceedings. When the "experience and logic" test has been applied beyond the trial itself, as in *Press-Enterprise II*, it has been limited to judicial proceedings that are part of the criminal trial process. *See also Washington Post v. Robinson*, 290 U.S. App. D.C. 116, 935 F.2d 282, 290 (D.C. Cir. 1991) (holding that First Amendment protects public access to plea agreement on which judgment has been entered); *but see United States v. El-Sayegh*, 327 U.S. App. D.C. 308, 131 F.3d 158, 160-61 (D.C. Cir. 1997) (applying "experience and logic test" but finding no First Amendment right of access to withdrawn plea agreement). Moreover, neither this Court nor the Supreme Court has ever *indicated* that it would apply the *Richmond Newspapers* test to anything other than criminal judicial proceedings. Indeed, there are no federal court precedents requiring, under the First Amendment, disclosure of information compiled during an Executive Branch investigation, such as the information sought in this case.

Indeed, to the extent the Supreme Court has addressed the constitutional right of access to information outside the criminal trial context, the Court has applied the general rule of

Houchins, not *Richmond Newspapers*. *See LAPD v. United Reporting Publ'g Corp.*, 528 U.S. 32, 40, 145 L. Ed. 2d 451, 120 S. Ct. 483 (1999) (holding that there is no *First Amendment* right to receive addresses of arrestees); *Houchins*, 438 U.S. at 13-15 (holding that press has no *First Amendment* right of access to prisons). In *Houchins*, the Court observed that the press had ample means for obtaining information about prison conditions, "albeit not as conveniently as they prefer." *Id.* at 15. For example, the Court noted that members of the press could receive letters from inmates and interview inmates' attorneys, prison visitors, or former inmates. *Id.* The same is true here. According to the government's declarations, detainees are free to contact family members as well as members of the press. Detainees' attorneys are presumably free to do the same. In *LAPD*, the Court rejected a facial challenge to a state law restricting access to the addresses of arrestees. 528 U.S. at 40. The Court explained that "this is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses." *Id.* Rather, "what we have before us is nothing more than a governmental denial of access to information in its possession. California could decide not to give out arrestee information at all without violating the *First Amendment*." *Id.* (citing *Houchins*, 438 U.S. at 14). Similarly here, the First Amendment is not implicated by the executive's refusal to disclose the identities of the detainees and information concerning their detention.

We will not convert the First Amendment right of access to criminal judicial proceedings into a requirement that the government disclose information compiled during the exercise of a quintessential executive power--the investigation and prevention of terrorism. The dangers which we have catalogued above of making such release in this case provide ample evidence of the need to follow this course. *Cf. Global Relief Found.*, 315 F.3d at 754 ("The Constitution would indeed be a

suicide pact . . . if the only way to curtail enemies' access to assets were to reveal information that might cost lives.") (citation omitted). To be sure, the Sixth Circuit recently held that the public has a constitutional right of access to INS deportation hearings involving the same INS detainees at issue in this case. *See Detroit Free Press*, 303 F.3d 681; *but see North Jersey Media Group*, 308 F.3d 198 (finding no right of access). However, the Sixth Circuit applied *Richmond Newspapers* only after extensively examining the similarity between deportation proceedings and criminal trials, *Detroit Free Press,* 303 F.3d at 696-99, and noting the crucial distinction between "*investigatory* information" and "access to information relating to a governmental *adjudicative* process," *id.* at 699. Inasmuch as plaintiffs here request investigatory--not adjudicative--information, we find *Detroit Free Press* distinguishable. We therefore will not expand the First Amendment right of public access to require disclosure of information compiled during the government's investigation of terrorist acts.

Accordingly, we conclude that the information sought by plaintiffs falls within the general principle announced in *Houchins* and affirmed in *LAPD*, rather than the *Richmond Newspapers* exception to that rule. Plaintiffs have no First Amendment right to receive the identities of INS and material witness detainees, nor are they entitled to receive information about the dates and locations of arrest, detention, and release for each detainee.

B. The Common Law

We also reject plaintiffs' final claim that disclosure is required by the common law right of access to public records. The Supreme Court held in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978),

that "the courts of this country recognize a general right to inspect and copy public records and documents, including judicial documents." *Id.* at 597. Plaintiffs, citing several state court cases finding a common law right of access to arrest records, urge us to recognize a federal common law right to receive the information they seek. In response, the government claims that the common law right of access is limited to judicial records. Even if the common law right applies to executive records, the government contends, FOIA has displaced the common law right. While we question the government's first contention, we accept its second.

This Court has held that the common law right of access extends beyond judicial records to the "public records" of all three branches of government, *Washington Legal Found. v. United States Sentencing Commission*, 319 U.S. App. D.C. 256, 89 F.3d 897, 903-04 (D.C. Cir. 1996), and we are bound by our precedent. We need not decide, however, whether the information sought by plaintiffs is a public record. Even if it is, the common law right of access is preempted by FOIA.

In *Nixon*, the Supreme Court assumed *arguendo* that the common law right of access covered the tapes sought by the media. 435 U.S. at 599. Nonetheless, the Court denied disclosure because the Presidential Recordings Act provided a statutory scheme for seeking access to the tapes. *Id.* at 603-06. The Court held that the presence of this "alternative means for public access tipped the scales in favor of denying release." *Id.* at 606. In *El-Sayegh*, this Court applied *Nixon*'s principle that a statutory disclosure scheme preempts the common law right. *See* 131 F.3d at 163. The Court found no common law right of access to a withdrawn plea agreement because "the appropriate device" for access to the records "is a Freedom of Information Act request addressed to the relevant agency." *Id.* (citing *Nixon,* 435 U.S. at 605-06).

The principles of *Nixon* and *El-Sayegh* apply with full force here. FOIA provides an extensive statutory regime for plaintiffs to request the information they seek. Not only is it uncontested that the requested information meets the general category of information for which FOIA mandates disclosure, but for the reasons set forth above, we have concluded that it falls within an express statutory exemption as well. It would make no sense for Congress to have enacted the balanced scheme of disclosure and exemption, and for the court to carefully apply that statutory scheme, and then to turn and determine that the statute had no effect on a preexisting common law right of access. Congress has provided a carefully calibrated statutory scheme, balancing the benefits and harms of disclosure. That scheme preempts any preexisting common law right.

In accordance with *Nixon* and *El-Sayegh*, we cannot craft federal common law when Congress has spoken directly to the issue at hand. *Milwaukee v. Illinois*, 451 U.S. 304, 314, 68 L. Ed. 2d 114, 101 S. Ct. 1784 (1981) ("when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal court disappears"). Consequently, we reject plaintiffs' claim that the common law right of access requires disclosure of the requested information.

IV. Conclusion

For the reasons set forth above, we conclude that the government was entitled to withhold under FOIA Exemption 7(A) the names of INS detainees and those detained as material witnesses in the course of the post-September 11 terrorism investigation; the dates and locations of arrest, detention, and release of all detainees, including those charged with federal crimes; and the names of counsel for detainees. Finally, neither

the First Amendment nor federal common law requires the government to disclose the information sought by plaintiffs.

Affirmed in part, reversed in part and remanded.

DISSENTBY: TATEL

DISSENT:

TATEL, Circuit Judge, dissenting: Disregarding settled principles governing the release of government records under the Freedom of Information Act, 5 U.S.C. § 552 et seq., this court holds that the government may keep secret the names of hundreds of persons whom it has detained in connection with its investigation of the September 11, 2001 terrorist attacks without distinguishing between information that can, in FOIA's words, "reasonably be expected to interfere" with the investigation and information that cannot. 5 U.S.C. § 552(b)(7)(A). While the government's reasons for withholding *some* of the information may well be legitimate, the court's uncritical deference to the government's vague, poorly explained arguments for withholding broad categories of information about the detainees, as well as its willingness to fill in the factual and logical gaps in the government's case, eviscerates both FOIA itself and the principles of openness in government that FOIA embodies.

I.

I begin with some preliminary observations about the principles that govern this case. First, no one can doubt that uniquely compelling governmental interests are at stake: the government's need to respond to the September 11 attacks-unquestionably the worst ever acts of terrorism on American soil--and its ability to defend the nation against future acts of

terrorism. But although this court overlooks it, there is another compelling interest at stake in this case: the public's interest in knowing whether the government, in responding to the attacks, is violating the constitutional rights of the hundreds of persons whom it has detained in connection with its terrorism investigation--by, as the plaintiffs allege, detaining them mainly because of their religion or ethnicity, holding them in custody for extended periods without charge, or preventing them from seeking or communicating with legal counsel. The government claims that the detainees have access to counsel and freedom to contact whomever they wish, *see* Op. at 5, but the public has a fundamental interest in being able to examine the veracity of such claims. Just as the government has a compelling interest in ensuring citizens' safety, so do citizens have a compelling interest in ensuring that their government does not, in discharging its duties, abuse one of its most awesome powers, the power to arrest and jail.

Second, while the governmental interests in this case may be uniquely compelling, the legal principles that govern its resolution are not at all unique. The court's opinion emphasizes the national-security implications of the September 11 investigation, but as the government conceded at oral argument, this case is not just about September 11. The law that governs this case is the same law that applies whenever the government's need for confidentiality in a law enforcement investigation runs up against the public's right to know "what [its] government is up to." *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773, 103 L. Ed. 2d 774, 109 S. Ct. 1468 (1989) (internal quotation marks omitted). In all such situations, FOIA fully accommodates the government's concerns about the harms that might arise from the release of information pertaining to its investigations. To be sure, the statute strongly favors openness, since Congress recognized that an informed citizenry is "vital

to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 57 L. Ed. 2d 159, 98 S. Ct. 2311 (1978). But Congress also recognized that "legitimate governmental and private interests could be harmed by release of certain types of information." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152, 107 L. Ed. 2d 462, 110 S. Ct. 471 (1989) (internal quotation marks omitted). It therefore "provided . . . specific exemptions under which disclosure could be refused," *id.*, including the four exemptions relevant to this case: Exemption 7(A), for information that "could reasonably be expected to" interfere with ongoing law enforcement efforts, 5 U.S.C. § 552(b)(7)(A); Exemptions 7(C) and 7(F), for information that "could reasonably be expected to" unjustifiably compromise an individual's privacy or physical safety, *id.* § 552(b)(7)(C), (b)(7)(F); and Exemption 3, for information that other statutes exempt from disclosure, *id.* § 552(b)(3). But "'these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.'" *John Doe Agency*, 493 U.S. at 152 (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361, 48 L. Ed. 2d 11, 96 S. Ct. 1592 (1976)). Accordingly, courts must "narrowly construe[ ]" the exemptions, and "the burden is on the agency to sustain its action." *Id.* (internal quotation marks and citations omitted). The government may in some situations withhold entire categories of records from disclosure, as it seeks to do here by withholding names and other information pertaining to all terrorism-investigation detainees. In order to sustain its burden, however, the government must demonstrate that "the range of circumstances included in the category 'characteristically supports an inference' that the statutory requirements for exemption are satisfied." *Nation Magazine v. United States Customs Serv.*, 315 U.S. App. D.C. 177, 71 F.3d 885, 893 (D.C. Cir. 1995) (citing *United States v. Landano*, 508 U.S.

165, 176-80, 124 L. Ed. 2d 84, 113 S. Ct. 2014 (1993)).

The third principle relates to the level of deference we owe the government. Invoking the "heightened deference to the judgments of the political branches with respect to matters of national security," *Zadvydas v. Davis*, 533 U.S. 678, 696, 150 L. Ed. 2d 653, 121 S. Ct. 2491 (2001), the government refuses to identify the specific categories of information that would actually interfere with its investigation, but rather asks us simply to trust its judgment. This court obeys, declaring that "the judiciary is in an extremely poor position to second-guess the executive's judgment in this area of national security." Op. at 15. But requiring agencies to make the detailed showing FOIA requires is not second-guessing their judgment about matters within their expertise. And in any event, this court is also in an extremely poor position to second-guess the legislature's judgment that the judiciary must play a meaningful role in reviewing FOIA exemption requests. Neither FOIA itself nor this circuit's interpretation of the statute authorizes the court to invoke the phrase "national security" to relieve the government of its burden of justifying its refusal to release information under FOIA.

To begin with, I think it not at all obvious that we owe heightened deference to the government in this case. Citing the legislative history of the 1974 amendments to FOIA's Exemption 1, 5 U.S.C. § 552(b)(1), the exemption for national-security matters, we have held that in evaluating Exemption 1 claims, "'substantial weight' is to be accorded to detailed agency affidavits setting forth the basis for exemption." *Weissman v. CIA*, 184 U.S. App. D.C. 117, 565 F.2d 692, 697 n.10 (D.C. Cir. 1977); *see also* S. REP. NO. 93-1200, at 12 (1974) ("'The conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects might

occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that the federal courts, in making *de novo* determinations in section 552 (b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.'"). We have also extended this heightened deference to cases involving Exemption 3 as it incorporates the *National Security Act of 1947*, which requires the CIA Director to protect "intelligence sources and methods" from unauthorized disclosure, 50 U.S.C § 403-3(c)(7). *E.g.*, *Halperin v. CIA*, 203 U.S. App. D.C. 110, 629 F.2d 144 (D.C. Cir. 1980) (National Security Act); *Weissman*, 184 U.S. App. D.C. 117, 565 F.2d 692 (Exemption 1 and National Security Act). The government, however, relies on neither Exemption 1 nor the National Security Act in this case, and contrary to the court's suggestion, *see* Op. at 15, we have never held that such heightened deference is also appropriate in Exemption 7 cases. Indeed, in *Weissman*, which the court cites for the proposition that "we owe the same deference under Exemption 7(A) in appropriate cases," we found Exemption 7 inapplicable in the case of the CIA's investigation into the FOIA requester's background "except under special collateral circumstances," for instance, to protect the identities of FBI personnel named in requested materials. We instead focused on the deference owed the agency under Exemption 1, as well as Exemption 3 as it incorporates the National Security Act. 565 F.2d at 694-96, 698 & n.15.

In any event, the government's case fails even under the heightened deference we have applied in Exemption 1 and National Security Act cases. No matter the level of deference, our review is not "vacuous." *Pratt v. Webster*, 218 U.S. App. D.C. 17, 673 F.2d 408, 421 (D.C. Cir. 1982). Even when reviewing Exemption 1's applicability to materials classified in

the interest of national security, we have made clear that no amount of deference can make up for agency allegations that display, for example, a "lack of detail and specificity, bad faith, [or] failure to account for contrary record evidence," since "deference is not equivalent to acquiescence." *Campbell v. U.S. Dep't of Justice*, 334 U.S. App. D.C. 20, 164 F.3d 20, 30 (D.C. Cir. 1998). By accepting the government's vague, poorly explained allegations, and by filling in the gaps in the government's case with its own assumptions about facts absent from the record, this court has converted deference into acquiescence.

With these principles in mind, I examine each of the government's arguments for withholding the detainee information. Part II explains why Exemption 7(A), which forms the basis of the court's holding, cannot justify the government's refusal to disclose the bulk of the requested information about the detainees. Part III shows why the government's alternative arguments under Exemptions 7(C), 7(F), and 3 as it incorporates Federal Rule of Criminal Procedure 6(e) likewise fail. Finally, Part IV demonstrates why, on the basis of the record before us, the government has no basis under any exemption for withholding the names of the detainees' attorneys.

II.

Although FOIA permits agencies to craft rules exempting certain categories of records from disclosure under Exemption 7(A) instead of making a record-by-record showing, *see Robbins Tire*, 437 U.S. at 236, an agency's ability to rely on categorical rules has limits. Specifically, the government must divide information it seeks to withhold into "categories . . . [that are] sufficiently distinct to allow a court to grasp 'how each . . . category of documents, if disclosed, would interfere

with the investigation.'" *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 252 U.S. App. D.C. 232, 789 F.2d 64, 67 (D.C. Cir. 1986) (quoting *Campbell v. Dep't of Health & Human Servs.*, 221 U.S. App. D.C. 1, 682 F.2d 256, 265 (D.C. Cir. 1982)). An acceptable category is "functional," that is, it "allows the court to trace a rational link between the nature of the document and the alleged likely interference." *Id.*; *see also Nation Magazine*, 71 F.3d at 893 ("There are limits ... to when categorical rules may be employed. Only when the range of circumstances included in the category 'characteristically supports an inference' that the statutory requirements for exemption are satisfied is such a rule appropriate.").

Although I have no doubt that some of the requested information is exempt from FOIA's mandatory disclosure requirement, the court treats disclosure as an all-or-nothing proposition, repeatedly emphasizing the breadth of the plaintiffs' request--the fact that they seek the names and other information pertaining to "every single individual detained in the course of the government's terrorism investigation," Op. at 17--as a justification for accepting the government's own very broad, categorical refusal to release the bulk of the requested information. This all-or-nothing approach runs directly counter to well-established principles governing FOIA requests. Nothing in the statute requires requesters to seek only information not exempt from disclosure. To the contrary, the government bears the burden of reviewing the plaintiffs' request, identifying functional categories of information that are exempt from disclosure, and disclosing any reasonably segregable, non-exempt portion of the requested materials. 5 U.S.C. § 552(b). The government fails to satisfy that burden in this case, for the range of circumstances included in the government's exemption request do not "characteristically support" an inference that the information would interfere with its terrorism investigation.

In support of its exemption request, the government offers declarations from two senior officials with responsibility for the terrorism investigation. One of those declarations, by Dale L. Watson, a Federal Bureau of Investigation official charged with supervising the investigation, was prepared not for this case, but for cases involving the closure of deportation hearings. *See N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 155 L. Ed. 2d 1106, 2003 WL 1191395 (May 27, 2003); *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002). Watson's declaration thus speaks not to the harm that would flow from disclosing detainees' names or other information, but instead to the harm that would flow from publicly airing evidence about particular detainees at such a hearing--i.e., "what evidence led to the detention of each individual," "information about how any given individual entered the country," and "what evidence the United States has against members of a particular cell." Watson Decl. PP 12-13. Plaintiffs in this case request no such information. The court nevertheless relies on the Watson declaration, as well as *North Jersey Media Group*, *see* Op. at 22-23, despite the fact that neither has anything to do with the release of detainee names.

The other declaration, by Department of Justice Terrorism and Violent Crime Section chief James S. Reynolds, does in fact outline the harms that might result from release of some detainee names. But it does not support the government's request for a 7(A) exemption, since that request treats all detainees the same, even though Reynolds tells us that the only common thread among the detainees is that they were "originally questioned because there were indications that they might have connections with, or possess information pertaining to, terrorist activity against the United States." Reynolds Decl. P 10; *see also id.* PP 27, 36. As Reynolds himself acknowledges, this group includes some detainees who have turned out to be innocent of any involvement with terrorist

activity and have "no information useful to the investigation." *Id.* P 36.

Ignoring this important concession, the court declares that "the clear import of the declarations is that many of the detainees have links to terrorism"--which the court considers "no surprise given that the detainees were apprehended during the course of a terrorism investigation, and given that several detainees have been charged with federal terrorism crimes or held as enemy combatants." Op. at 21. The court's approach is unconvincing for two reasons.

To begin with, it rests on what seems to be a faulty assumption about facts not in evidence. As of November 5, 2001, the last time the government released a tally, there were 1,182 detainees. *See* Dan Eggen & Susan Schmidt, *Count of Released Detainees Is Hard to Pin Down*, WASH. POST, Nov. 6, 2001, at A10 (quoting Justice Department spokeswoman Mindy Tucker). Nothing in the record tells us how many of those 1,182 detainees have been charged with federal terrorism crimes or held as enemy combatants. What little information the record does contain, however, suggests that the number may be relatively small. A list of federally charged detainees attached to the government's motion for summary judgment reports that as of the time this suit was filed, only one detainee had been criminally charged in the September 11 attacks and only 108 detainees had been charged with any federal crime -- primarily violations of antifraud statutes. Reynolds Decl. P 27; Def. Mot. for Summary Judgment, Ex. 8.

In any event, the court concedes the point -- even if "many" of those "apprehended during the course of a terrorism investigation" have links to terrorism, not *all* of them do. As the court itself notes, the declarations establish that many of the INS detainees were held because law enforcement agents

determined in the course of questioning them that they were in violation of federal laws; only "'in some instances'" did agents "also determine[ ] that they had links to other facets of the investigation." Op. at 21 (quoting Reynolds Decl. P 10). Furthermore, although the court assumes that all those detained on material witness warrants "have relevant knowledge about the terrorism investigation" because a federal judge issues such warrants "based on an affidavit stating that the witness has information relevant to an ongoing criminal investigation," Op. at 20, that assumption seems unwarranted given the government's concession that "it may turn out that these individuals have no information useful to the investigation," Reynolds Decl. P 36.

The government gives us no reason to think that releasing the names of these innocent detainees could interfere with its investigation. Indeed, the government never really asks us to believe that disclosure of the names of innocent persons having no knowledge of terrorist activity would in any way impede its ability to gather information from those who do have such knowledge. Instead, it asserts that "a detainee who knows his name will be made public may be deterred from cooperating now or in the future for fear of retaliation by terrorist organizations against him or his family and associates." Reynolds Decl. P 15. Although the court accepts this argument, Op. at 19, it is ultimately not an argument for withholding detainees' names, but rather for withholding the names of people who have information that might be helpful to law enforcement officials. These are two different categories of people, for as Reynolds acknowledges, many detainees have no information to provide. Reynolds Decl. P 36. These two groups thus merit different treatment. In fact, several statutory provisions address precisely the problem the government identifies, but all of them are aimed at protecting the identities of those people who provide information, not people the

government questions because it thinks they *might* have information but who turn out not to. FOIA Exemption 7(A) protects the identities of witnesses where disclosure might pose a risk of interference in the form of witness intimidation or coercion, *Robbins Tire*, 437 U.S. at 239-40; FOIA Exemption 7(D) protects the identities of sources who choose to provide information to law enforcement agents on a confidential basis, 5 U.S.C. § 552(b)(7)(D); and the National Security Act protects the identity of intelligence sources in order to prevent those sources from "closing up like a clam," *CIA v. Sims*, 471 U.S. 159, 172, 85 L. Ed. 2d 173, 105 S. Ct. 1881 (1985) (internal quotation marks omitted). The government can and should rely on these provisions to protect the names of detainees who provide information to law enforcement agents or whom the government believes will be able to provide such information in the future. The government may not, however, preemptively withhold the identities of innocent detainees who do not now, and may never, have any information of use to the terrorism investigation.

The only argument that could conceivably support withholding innocent detainees' names is the assertion that disclosure of the names "*may* reveal details about the focus and scope of the investigation and thereby allow terrorists to counteract it." Reynolds Decl. P 16 (emphasis added). That Reynolds believes these harms *may* result from disclosure is hardly surprising--anything is possible. But before accepting the government's argument, this court must insist on knowing whether these harms "*could reasonably be expected to*" result from disclosure--the standard Congress prescribed for exemption under 7(A). Nothing in Reynolds's declaration suggests that these harms are in fact reasonably likely to occur.

To begin with, Reynolds never explains how a list of names of persons unknown to terrorist organizations would tell

the terrorists anything at all about the investigation, much less allow them to "map [its] progress." *Id.* For example, if the government tells us that it detained men named Mohammed Mubeen, Osama Elfar, Ghassan Dahduli, Fathi Mustafa, Nacer Fathi Mustafa, and Hady Omar, Jr., none of whom has any connection to terrorist organizations, *see* Amy Goldstein, *A Deliberate Strategy of Disruption: Massive, Secretive Detention Effort Aimed Mainly at Preventing More Terror*, WASH. POST, Nov. 4, 2001, at A1, what could that information possibly tell terrorists about the government's investigation? Though Reynolds's declaration provides no answer, the court speculates that the names of these innocent detainees could be valuable to terrorist organizations because "such detainees could be acquaintances of the September 11 terrorists, or members of the same community groups or mosques." Op. at 19. That may well be true in some cases, but if it is, Reynolds should tell us so under oath, thus providing a record basis for the government to claim an exemption for those detainees who pose such concerns. But the court's speculation, supported only by a newspaper article describing a single detainee who attended a mosque that two terrorism suspects also attended, *see id.* (citing Rachel L. Swarns, *Muslims Protest Monthlong Detention Without a Charge*, N.Y. TIMES, April 20, 2003, at A16), falls far short of satisfying the government's burden under FOIA.

The government's failure to provide an adequate explanation is all the more glaring given that the detainees represent only a subset--and quite possibly a very small subset--of persons questioned in connection with this investigation. Reynolds Supp. Decl. P 2. As a result, even if releasing detainee names were to provide some insight into the terrorism investigation, that insight would be limited. Releasing the names of the detainees, but not the names of those questioned in connection with the investigation, can paint only a partial--

and possibly misleading--picture of the government's investigative strategy. For example, if the government detains two people in Detroit but questions a thousand in Chicago, wouldn't release of the detainee information wrongly lead terrorist organizations to believe that the government was focusing on Detroit, not Chicago?

The second failing in both the government's request and the court's analysis is that they treat all detainee information the same, despite the fact that each item of information that plaintiffs seek about the detainees -- names, attorneys' names, dates and locations of arrest, places of detention, and dates of release -- is clearly of very different value to terrorists attempting to discern the scope and direction of the government's investigation. Although the Reynolds declaration tells us that "releasing the names of the detainees who may be associated with terrorism and their place and date of arrest would reveal the direction and progress of the investigations," Reynolds Decl. P 16, it does not tell us, for example, whether releasing the detainees' names and dates of arrest, but not their places of arrest -- or even releasing the dates of arrest alone -- would involve the same danger. The Reynolds declaration, moreover, contains no justification at all for withholding dates of release. Indeed, the government has already disclosed the release dates of detainees who had been held on federal criminal charges. *Id.* P 8. This information may seem unimportant, but from the FOIA requesters' point of view, it could be highly relevant to the question of how the government is treating the persons it has detained. Taken together, arrest and release dates can tell the public how long persons have been detained, raising concerns about possible constitutional violations. *See* Appellees' Br. at 27.

The government's allegations of harm are also undercut by the fact that it has itself provided several other means by which

this information can become public. Not only do detainees remain free to inform whomever they choose of their detention, Reynolds Decl. P 23, but on numerous occasions since September 11, the government itself has disclosed precisely the kind of information it now refuses to provide under FOIA. For example, on April 17, 2002, the government announced the arrest of Issaya Nombo, whom government officials said they suspected of connections to terrorism, although he was arrested on immigration charges. Officials revealed Nombo's name and the date and place of his arrest. Philip Shenon, *African Held After Name Is Left in Cave*, N.Y. TIMES, Apr. 18, 2002, at A15. At a June 10, 2002 press conference, the Attorney General announced the arrest of one Abdulla Al Muhajir, born Jose Padilla, for suspected terrorism involvement, revealing not only Al Muhajir's two names, but also the date and place of his arrest, and the events leading to his capture. Attorney General Ashcroft News Conference, June 10, 2002, *available at* http:/www.usdoj.gov/ag/speeches/2002/061002agtranscripts.htm. And on July 26, 2002, government officials announced they were holding Mohammad Mansur Jabarah on a material witness warrant after his arrest in connection with a terrorist plot in Singapore. William K. Rashbaum, *Captured Qaeda Member Gives Details on Group's Operations*, N.Y. TIMES, July 27, 2002, at A8.

Nothing in the record explains why the government's concerns about interference with the investigation do not apply with respect to detainees such as Abdulla Al Muhajir, Issaya Nombo, and Mohammad Mansur Jabarah, but do nevertheless apply with respect to the other detainees. In its reply brief, the government explains that it may have strategic reasons for disclosing certain information, since its disclosures to date "have identified specific individuals in a manner unlikely, in the view of the law enforcement experts, to impede the progress of the investigation." Appellant's Reply Br. at 18.

While this may well be so, it is an argument of counsel, and though the court accepts it, FOIA requires that the agency--not counsel--explain such judgments under oath. The reason for this requirement is clear: We owe deference to agency expertise, not to lawyers defending the agency in litigation. *See, e.g.*, *Church of Scientology v. IRS*, 253 U.S. App. D.C. 85, 792 F.2d 153, 165-166 (D.C. Cir. 1986) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 L. Ed. 626, 63 S. Ct. 454 (1943)). If there are legitimate investigative reasons for releasing the names of some detainees, but not others, then Mr. Reynolds or others responsible for the terrorism investigation should explain those reasons under oath--in an in camera affidavit, if necessary to protect the information--and that explanation would probably warrant judicial deference.

It is true, as the court points out, that the Supreme Court in *CIA v. Sims* acknowledged "the political realities of intelligence operations in which, among other things, our Government may choose to release information deliberately to 'send a message' to allies or adversaries" when it upheld the CIA's right to withhold intelligence information even if the CIA has already released some part of it. 471 U.S. at 180. Unlike this court, however, the Supreme Court did not simply assume it understood the government's strategy; it reached its conclusion on the basis of the CIA Director's affidavit explaining that strategy. *Id.* at 180 & n.24. The record in this case contains no similar explanation. Moreover, counsel's argument suggests that the government itself differentiates among detainees on a case-by-case basis for purposes of assessing how disclosure might harm its investigation. If the government itself makes such distinctions in deciding what information to release, then why, particularly in light of FOIA's exacting standards, doesn't it make those distinctions in its exemption request before this court?

By asking these questions, the court would not, as it warns, be "second-guessing" the government's judgments about matters of national security. Op. at 15. It would, rather, be doing the job Congress assigned the judiciary by insisting that the government do the job Congress assigned to it: provide a rational explanation of its reasons for claiming exemption from FOIA's disclosure requirements.

III.

Because the court concludes that Exemption 7(A) applies to the government's entire request, it never addresses the government's alternative arguments under Exemptions 7(C), 7(F), and 3. In my view, none of these provisions supports the government's refusal to disclose the detainee information either.

Exemption 7(C)

Exemption 7(C) permits the government to withhold law enforcement records where their release "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Like Exemption 7(A), the application of Exemption 7(C) is subject to a set of well-established standards. Because the statute refers not to invasions of privacy generally, but to "unwarranted" invasions of privacy, courts evaluating claims for 7(C) exemption must do more than simply identify a privacy interest that will be compromised by disclosure of information. Instead, they must "balance the public interest in disclosure against the interest Congress intended the Exemption to protect." *Reporters Committee*, 489 U.S. at 776.

Relying on our decision in *Nation Magazine*, the government argues that the detainees have "'an obvious

privacy interest cognizable under Exemption 7(C) in keeping secret the fact that they were subjects of a law enforcement investigation,'" and that these privacy concerns are "particularly acute given the nature and magnitude of the September 11 attacks." Appellant's Br. at 39-40 (quoting *Nation Magazine*, 71 F.3d at 894). This argument is unconvincing. For one thing, if the government is so concerned with the detainees' privacy, why has it released so much information about them? What about Abdulla Al Muhajir's privacy, or Issaya Nombo's, or Mohammad Mansur Jabarah's? Nothing in the Reynolds declaration explains how the government's press conferences releasing the names of these detainees demonstrate any respect for their privacy.

In any event, we have never held that individuals who have been not only investigated, but also arrested and jailed, have a similar privacy interest in avoiding "unwarranted association with criminal activity or reputational harm." *Nation Magazine*, 71 F.3d at 894. Even though being arrested subjects a person suspected of criminal activity to embarrassment and potentially more serious reputational harm, the law is nevertheless clear that no right of privacy "is violated by the disclosure of 'an official act such as an arrest.'" *AFGE v. HUD*, 326 U.S. App. D.C. 185, 118 F.3d 786, 794 (D.C. Cir. 1997) (quoting *Paul v. Davis*, 424 U.S. 693, 713, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976)).

To be sure, detainees may have a unique interest in avoiding association with the crimes of September 11. Even so, that interest is clearly outweighed by the public interest in knowing whether the government, in investigating those heinous crimes, is violating the rights of persons it has detained. And while FOIA asks only whether the public interest in disclosure outweighs the private interest in secrecy, it bears noting that the private interests in this case weigh on

both sides of the balance: Plaintiffs' request for disclosure of the detainees' names seeks to vindicate not only the public's right to know what its government is up to, but also the detainees' own rights, including the right to counsel and to speedy trial.

Nothing in *SafeCard Services, Inc. v. SEC*, 288 U.S. App. D.C. 324, 926 F.2d 1197 (D.C. Cir. 1991), requires a different result. *SafeCard* establishes that names appearing in law enforcement files will often fall within the scope of Exemption 7(C), since records containing such information are generally far less probative of an agency's behavior or performance than of the behavior of the persons whose names appear in the records. *Id.* at 1205 [illegible] *Nation Magazine*, 71 F.3d at 895 ("In some, perhap[illegible]nces where a third party asks if an agency has information regarding a named individual in law enforcement files, the cognizable public interest in that information will be negligible; the requester will be seeking records about a private citizen, not agency conduct."). The *SafeCard* court therefore formulated a categorical rule exempting disclosure of such information unless the requester can show (1) compelling evidence that the agency is engaged in illegal activity, and (2) that the information is necessary to confirm or refute that evidence. *SafeCard*, 926 F.2d at 1205-06. Plaintiffs' FOIA request satisfies both elements of this rule.

To begin with, this case does not implicate *SafeCard*'s concern that disclosure of names in law enforcement files will generally shed less light on the government's behavior than it does on the behavior of private citizens. In *SafeCard*, the FOIA requester sought information relating to organizations and individuals whom the SEC had suspected of manipulating the requester's stock and who might be witnesses or litigants in the SEC's investigations. 926 F.2d at 1200, 1205. Similarly, in many other Exemption 7(C) cases, FOIA requesters seek

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names in law enforcement files primarily in order to attack their convictions or otherwise exculpate themselves--a "personal stake" in disclosure that "does not count in the calculation of the public interest." *Oguaju v. United States*, 351 U.S. App. D.C. 195, 288 F.3d 448, 450 (D.C. Cir. 2002); *see also Billington v. United States Dep't of Justice*, 344 U.S. App. D.C. 53, 233 F.3d 581, 582 (D.C. Cir. 2000). Here, in contrast, plaintiffs have little if any personal stake in their FOIA request, which aims solely to glean information relating to the government's conduct of its terrorism investigation and its treatment of the detainees. Designed to "shed[ ] light on an agency's performance of its statutory duties," this request implicates precisely the kind of public interest lying at the heart of Exemption 7(C)'s balancing test. *Reporters Committee*, 489 U.S. at 773.

Moreover, plaintiffs offer ample evidence of agency wrongdoing. The record includes hundreds of pages of newspaper articles, human rights reports, and congressional testimony reporting alleged governmental abuses such as holding detainees for long periods without allowing them to seek or communicate with counsel and without charging them. *See, e.g.*, Alison Leigh Cowen, *Detainees' Lawyers Complain of Unfair Treatment*, N.Y. TIMES, Oct. 21, 2001, at B1; Richard A. Serrano, *Many Held in Terror Probe Report Rights Being Abused*, L.A. TIMES, Oct. 15, 2001, at A1; Amnesty International, *Amnesty International's Concerns Regarding Post September 11 Detentions in the USA*, *available at* http://web.amnesty.org/aidoc/aidoc_pdf.nsf; Human Rights Watch, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*, *available at* http://www.hrw.org/reports/2002/us911/USA0802.pdf; *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the Senate Judiciary Comm.*, 107th Cong. (2001) (statement of

Gerald H. Goldstein, Attorney, National Ass'n of Criminal Defense Lawyers), *available at* http://judiciary.senate.gov/hearing.cfm?=28; *id.* (statement of Michael Boyle, Attorney, American Immigration Lawyers Ass'n). To be sure, none of this evidence has been tested and proved in a court of law. But *SafeCard* requires only "compelling" evidence--not tested evidence, and not even evidence that would be admissible at trial. If hundreds of pages of first-hand reports of governmental abuses do not qualify as "compelling" evidence sufficient to justify an investigation into the government's conduct, then I cannot imagine what would. After all, FOIA's purpose, as *SafeCard* recognizes, is to allow the public access to records necessary to ascertain whether the government has acted illegally. If requesters already had tried and tested proof of such illegal activity, then resort to FOIA would be unnecessary. History, moreover, is full of examples of situations in which just these sorts of allegations led to the discovery of serious government wrongdoing--from Teapot Dome in the 1920s to the FBI's COINTELPRO counterintelligence program in the 1960s to Watergate in the 1970s.

In short, by interpreting *SafeCard* to require anything more than compelling "allegations of illegal agency activity," *Nation Magazine*, 71 F.3d at 896, the government would transform the *SafeCard* test into a categorical ban on the disclosure of names contained in law enforcement records. That result finds justification in neither FOIA nor our cases interpreting Exemption 7(C). *See Nation Magazine*, 71 F.3d at 896 (holding that a blanket exemption for all names in law enforcement records "would be contrary to FOIA's overall purpose of disclosure, and thus is not a permissible reading of Exemption 7(C)"); *Stern v. FBI*, 237 U.S. App. D.C. 302, 737 F.2d 84 (D.C. Cir. 1984) (ordering the disclosure of the name of a high-ranking FBI official in internal reports concerning the agency's

investigation of a cover-up).

Finally, plaintiffs need the information they request to confirm or refute the compelling evidence of agency wrongdoing--the *SafeCard* test's second requirement. While it is true that a list of names alone would shed no light on whether the government has respected detainees' constitutional rights, plaintiffs need the names in order to gather information about the government's treatment of the detainees. Appellees' Br. at 30. In this respect, plaintiffs' request differs from the vast majority of FOIA requests for information concerning named individuals in law enforcement files, where the only plausible public interest is knowing to what extent an agency believed the named individuals were involved in illegal activity. *Cf. Rosenfeld v. United States Dep't of Justice*, 57 F.3d 803, 812 (9th Cir. 1995) (holding that Exemption 7(C) does not justify withholding the identities of persons investigated for subversive activities in FBI files, where the names would make it possible to determine whether the FBI had investigated student activists for participating in political protests by comparing the FBI's investigations to a roster of a student activist group's leadership).

Amici Washington Legal Foundation and the Jewish Institute for National Security Affairs contend that release of the information is not necessary to evaluate whether the government is operating within the bounds of the law in detaining persons in connection with its terrorism investigation, since the public has other means of obtaining the information: Individual detainees can bring individual lawsuits, the Department's Inspector General has investigated allegations of misconduct, and media reports and congressional investigations all tell the public what its "government is up to." Washington Legal Found. Br. in Support of Appellant at 17. But *Amici*'s argument has no basis in FOIA. If Congress had

intended for individual lawsuits, internal investigations, or newspaper reports to relieve the government of its obligations under FOIA, then it would have expressed that intent in the law.

Exemption 7(F)

The government next invokes Exemption 7(F), which permits withholding law enforcement records where their release "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). Here again, the government's evidence fails to establish that the entire range of records encompassed in the plaintiffs' FOIA request "could reasonably be expected" to endanger the detainees.

The government's declarations tell us only that (1) "detainees who are, in fact[,] affiliated with a terrorist group may be perceived by such groups as informants for the United States and be killed to preclude their future cooperation," Reynolds Decl. P 37, and (2) "if prisoners learn that an individual who was detained as a result of the investigation emanating from the September 11 attacks is in their own prison facility, some may try to retaliate against this individual," *id.* P 29. The government tells us nothing about what threat, if any, disclosure would pose to detainees who are neither affiliated with a terrorist group nor currently imprisoned. And the government's own disclosures again undermine its assertions about detainees' safety. Plaintiffs point out that the Justice Department Inspector General himself named two of the detention centers used to house the terrorism investigation detainees, a fact that the government neither denies nor explains. Appellees' Br. at 27. Again, the government may have had reasons for disclosing the names of only these two detention centers, but nothing in the Reynolds declaration tells

us what those reasons might be.

Exemption 3

Finally, the government invokes *Exemption 3*, which exempts from disclosure matters that are "specifically exempted from disclosure by statute ..., provided that such statute . . . requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." 5 U.S.C. § 552(b)(3). According to the government, Exemption 3, which encompasses Federal Rule of Criminal Procedure 6(e)'s prohibition on the disclosure of "matters occurring before the grand jury," *see Fund for Constitutional Gov't v. Nat'l Archives & Records Serv.*, 211 U.S. App. D.C. 267, 656 F.2d 856, 867-68 (D.C. Cir. 1981), excuses it from disclosing the names of detainees held on material witness warrants, since "each of these warrants was issued to procure a witness's testimony before a grand jury," Reynolds Second Supp. Decl. P 4. As such, the government contends that Exemption 3 provides a ground for nondisclosure independent of Exemption 7.

Rule 6(e) forbids disclosure of "not only what has occurred and what is occurring, but also what is likely to occur" before a grand jury, including disclosure of witnesses' identities. *In re Motions of Dow Jones & Co.*, 330 U.S. App. D.C. 48, 142 F.3d 496, 500 (D.C. Cir. 1998). Therefore, the names of persons detained on material witness warrants who have actually testified before grand juries are unquestionably exempt from disclosure. The government, however, insists that Exemption 3 also covers the names of material witness detainees who have neither testified before grand juries nor are scheduled to do so, as well as the names of detainees who were released without ever having testified, because all of these detainees were originally detained in order to "procure [their]

testimony before a grand jury." Reynolds Second Supp. Decl. P 4.

Saying that the material witness detainees were held in order to secure their testimony is quite different from saying that their testimony is "likely to occur" before a grand jury. Indeed, the record indicates that at least seven material witnesses have been released without testifying before a grand jury, so in their cases, it seems more accurate to say that their testimony is quite *unlikely* to occur before a grand jury. *See Indiana Men Ordered to Testify to Return to Evansville*, ASSOC. PRESS, Oct. 25, 2001. Furthermore, although current detainees may be, on the whole, somewhat more likely to testify before grand juries, their testimony is not necessarily "likely to occur" for purposes of Rule 6(e). We have said that the "likely to occur" language must be read sensibly: It does not authorize the government to draw "a veil of secrecy . . . over all matters occurring in the world that happen to be investigated by a grand jury." *In re Sealed Case*, 338 U.S. App. D.C. 158, 192 F.3d 995, 1001-02 (D.C. Cir. 1999) (internal quotation marks and citation omitted). Accordingly, we have made clear that Rule 6(e) covers "testimony *about to be* presented to a grand jury" (emphasis added)--hence the "likely to occur" language--but does not cover government investigations that merely parallel grand jury investigations. *Id.* at 1002-03. Because the government fails to show that all material witness detainees are likely to testify before grand juries, it may not, on this record, withhold their names under Rule 6(e). To hold otherwise would convert this circuit's carefully crafted standard into an absolute rule that would permit the government to keep secret the name of any witness whom it ever thought might testify at a grand jury proceeding, or who might testify at some indefinite point in the future. Neither Rule 6(e) nor the law of this circuit justifies that result.

IV.

No part of the government's exemption request better illustrates its infirmities than its refusal to disclose the names of the detainees' attorneys. Essentially rehashing its arguments for withholding the names of the attorneys' clients, the government argues--and the court agrees, *see* Op. at 23--that releasing attorneys' names would interfere with the terrorism investigation and would compromise the detainees' privacy interests, since releasing a list of attorneys "may facilitate the identification of the detainees themselves." Reynolds Decl. P 18. The government also claims to be withholding the attorneys' names for their own good, warning that attorneys identified as representing individuals detained in connection with the terrorism investigation "run the risk that they will be subjected to harassment or retaliation in their personal as well as professional lives." Reynolds Decl. P 26.

Both parts of this argument are not only profoundly wrong, but also reflect a complete misunderstanding of the nature of this country's legal profession. In the first place, attorneys' names are quite clearly not a proxy for the names of their clients. Indeed, recognizing that knowledge of the lawyer's identity does not inexorably lead to identifying the client, ethical rules forbid lawyers from identifying their clients without their consent, except in extraordinary circumstances. Rule 1.6 of the *Model Rules of Professional Conduct* provides that absent extraordinary circumstances, "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives consent after consultation"--a prohibition that generally includes disclosure of a client's identity. *See* CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 83 (4th ed. 1999). Because the decision ultimately belongs to the detainees and not their

lawyers, providing a list of the lawyers' names would do little more to facilitate identification of the detainees than the government's current policy of allowing the detainees to identify themselves to the media and to whomever else they choose.

Even assuming that releasing attorneys' names will somehow facilitate identification of the detainees, the court's all-or-nothing approach again impermissibly shifts the burden of identifying exempt information from the government to plaintiffs. The government's Exemption 7(A) argument for withholding lawyers' names thus fails for the same reason as its 7(A) argument for withholding the names of all detainees. How would releasing the names of attorneys representing innocent clients with no connection to terrorist activities interfere with the government's terrorism investigation? Neither the court nor the government provides an explanation.

The government's second argument fares no better. The notion that the government must withhold the attorneys' names for their own good is flatly inconsistent with lawyers' roles as advocates and officers of the court in our fundamentally open legal system. Having voluntarily assumed this public role, lawyers have little expectation of anonymity. I, for one, know of no lawyer who has ever asked for the kind of protection the government now asserts on behalf of the detainees' lawyers. Moreover, I have no doubt that lawyers will represent individuals associated with the terrorism investigation even without the protection the government urges. As Judge Kessler noted in her opinion in this case, the history of our profession is full of examples of brave men and women who have taken on unpopular causes in the interest of justice. *Center for Nat'l Sec. Studies v. Dep't of Justice*, 215 F. Supp. 2d 94, 109 (D.D.C. 2002). Not only do lawyers regularly represent persons accused of terrible and highly publicized crimes against

individuals, but many of this country's most prominent and well-respected lawyers have defended persons accused of heinous crimes against the state, from Aaron Burr to Nazi saboteurs to Soviet spies, as well as persons merely suspected of a propensity to commit such crimes, such as Japanese internees in World War II.

In addition, the government completely fails to substantiate its concerns about releasing attorneys' names. The government insists that "in light of the brutality of the acts committed against the United States, even the mere possibility of retaliation against these lawyers justifies withholding their identities." Reynolds Decl. P 38. FOIA, of course, does not allow the government to withhold information based on "mere possibilities." And the Reynolds declaration fails to establish that retaliation is reasonably likely. Indeed, if the government is so worried about retaliation against lawyers, why did it release a comprehensive list of attorneys representing federally charged detainees? *See* Def. Mot. for Summary Judgment, Ex. 8. Reynolds provides no answer. And if the risk of retaliation has materialized in the case of these attorneys, Reynolds certainly does not tell us so.

If the government has legitimate concerns about the safety of one or more of the lawyers, FOIA requires it to describe those concerns with reasonable specificity--again in an in camera affidavit, if necessary--and explain why it believes the harms it fears "could reasonably be expected" to occur. Giving appropriate deference to law enforcement expertise, the district court would then be in a position to evaluate the government's concerns and determine whether withholding the attorneys' names under Exemption 7(F)--or some other, less extraordinary measures--are needed to protect the detainees' attorneys. Absent such evidence, however, the government has no basis for its flat refusal to release lawyers' names.

V.

Although I think it unreasonable to infer that all of the information plaintiffs seek in their FOIA request qualifies for exemption, the government may be able to point to more narrowly defined categories of information that might justify the inference. For example, while nothing in the record supports the government's contention that releasing the names of innocent detainees would harm the investigation, perhaps the government could justify withholding the places of arrest on the ground that such information might provide terrorist organizations with some insight into the government's investigative methods and strategy. I would therefore remand to allow the government to describe, for each detainee or reasonably defined category of detainees, on what basis it may withhold their names and other information.

This "more particularized approach" comports with both "Congress' intent to provide workable rules of FOIA disclosure," *United States v. Landano*, 508 U.S. 165, 180, 124 L. Ed. 2d 84, 113 S. Ct. 2014 (1993) (internal quotation marks and citations omitted), and FOIA's ultimate aim: to give the public "access to information about how Government is exercising its trust," at a time when "Government is becoming involved in more and more aspects of every citizen's personal and business life." 112 Cong. Rec. 13654 (1966) (statement of Rep. Rumsfeld). It would also ensure that this court treat FOIA as "a disclosure statute and not as an excuse to withhold information from the public." *Id.*

Rather than hold the government to clearly established standards governing FOIA exemptions, the court sustains the government's vague, ill-explained decision to withhold information, invoking principles of deference and engaging in its own speculation to fill in the gaps in the government's

showing. In my view, the court's approach drastically diminishes, if not eliminates, the judiciary's role in FOIA cases that implicate national-security interests. Congress certainly could have written FOIA that way, but chose instead to require meaningful judicial review of all government exemption claims. If the government thinks that a new, broader FOIA exemption is needed for terrorism cases, it should ask Congress to create one, just as in the wake of September 11 it asked Congress to authorize roving wiretaps of suspected terrorists and to permit detention of non-U.S. citizens suspected of terrorism without specific charges. *See* USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001). But this court may not change the law in Congress's stead. For all its concern about the separation-of-powers principles at issue in this case, the court violates those principles by essentially abdicating its responsibility to apply the law as Congress wrote it. I dissent.

Appendix B

CENTER FOR NATIONAL SECURITY STUDIES, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.

Civil Action No. 01-2500 (GK)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

215 F. Supp. 2d 94; 2002 U.S. Dist. LEXIS 14168; 30 Media L. Rep. 2569

August 2, 2002, Decided

OPINION BY: Gladys Kessler

OPINION:

MEMORANDUM OPINION

Plaintiffs are the Center for National Security Studies, the American Civil Liberties Union, and twenty-one other public interest organizations committed to civil rights, human rights, and civil liberties issues.[1] Defendant is the Department of

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[1] Plaintiffs are the Center for National Security Studies, American Civil Liberties Union, Electronic Privacy Information Center, American-Arab Anti-Discrimination Committee, American Immigration Law Foundation, American Immigration Lawyers Association, Amnesty International USA, Arab-American Institute, Asian-American Legal Defense and Education Fund, Center for Constitutional Rights, Center for Democracy and Technology, Council on American Islamic Relations, First Amendment Foundation, Human Rights Watch, Multiracial Activist, Nation Magazine, National Association of Criminal Defense Lawyers, National

Justice ("DOJ").

On September 11, 2001 -- truly a day of infamy in our national history -- this country was attacked by terrorists in New York City and at the Pentagon across the river from Washington, D.C. We will recover from the physical damage inflicted by those attacks. The psychic damage suffered by the body politic of our country may take far longer to heal.

Immediately after the terrible events of September 11, the Government began its massive effort to investigate, identify and apprehend those who were responsible and to protect the American public against further attacks of this nature. As part of that effort the Government arrested and jailed -- or in the bloodless language of the law "detained" -- well over 1000 people in connection with its investigation. Despite demands from members of Congress, numerous civil liberties and human rights organizations, and the media, the Government refused to make public the number of people arrested, their names, their lawyers, the reasons for their detention, and other information relating to their whereabouts and circumstances.[2]

Black Police Association, Inc., Partnership for Civil Justice, Inc., People for the American Way Foundation, Reporters Committee for Freedom of the Press, and the World Organization Against Torture USA.

[2] Several newspapers wrote editorials urging the Government to release the names of the detainees, as did several ranking members of Congress. *See, e.g.*, Why Not Disclose?, Wash. Post, Oct. 31, 2001, at A26 (attached as Ex. 11 to Pls.' Mot.); Disappearing in America, N.Y. Times, Nov. 10, 2001, at A22 (attached as Ex. 15 to Pls.' Mot.); Government Too Secretive About Jailing Immigrants, Atlanta Journal-Constitution, Nov. 12, 2001, at A11 (attached as Ex. 16 to Pls.' Mot.); *see also* Pls.' Mot., Ex. 17 (October 31, 2001 letter to Attorney General John Ashcroft from Senators Patrick J. Leahy, Russell D. Feingold, Edward M. Kennedy and Representatives John Conyers, Jr. Jerrold Nadler, Sheila Jackson Lee, and Robert C. Scott)

Secret arrests are "a concept odious to a democratic society," *Morrow v. District of Columbia*, 135 U.S. App. D.C. 160, 417 F.2d 728, 741-742 (D.C. Cir. 1969), and profoundly antithetical to the bedrock values that characterize a free and open one such as ours. Plaintiffs in this case seek to vindicate that fundamental principle by relying primarily on the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as well as the First Amendment and common law. The animating principle behind the Freedom of Information Act is safeguarding the American public's right to know what "their Government is up to." *United States v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773, 103 L. Ed. 2d 774, 109 S. Ct. 1468 (1989) (internal citations omitted) In enacting that statute, Congress recognized that access to government records is critical to earning and keeping citizens' faith in their public institutions and to ensuring that those institutions operate within the bounds of the law.

Difficult times such as these have always tested our fidelity to the core democratic values of openness, government accountability, and the rule of law. The Court fully understands and appreciates that the first priority of the executive branch in a time of crisis is to ensure the physical security of its citizens. By the same token, the first priority of the judicial branch must be to ensure that our Government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship.

With these considerations in mind, the Court now turns to the parties' motions. This matter is before the Court on Defendant's Motion for Summary Judgment ("Def.'s Mot.") and Plaintiffs' Cross-motion for Summary Judgment ("Pls.' Mot."). Upon consideration of the motions, oppositions, replies, the Motions Hearing held in this matter on May 29, 2002, the amicus brief submitted by the Washington Legal

Foundation, and the entire record herein, and for the reasons stated below, the Court **grants in part and denies in part** Defendant's Motion for Summary Judgment and **grants in part and denies in part** Plaintiffs' Cross Motion for Summary Judgment.

I. BACKGROUND

Following the terrorist attacks of September 11, 2001, the United States government launched a massive investigation into the attacks as well as into "threats, conspiracies, and attempts to perpetrate terrorist acts against [the] United States." Declaration of James S. Reynolds ("Reynolds Decl.") P 2 (Attached as Ex. 1 to Def.'s Mot.).

On October 25, 2001, Attorney General John Ashcroft announced that the "anti-terrorism offensive has arrested or detained nearly 1,000 individuals as part of the September 11 investigation." Amended Compl. P 28; Answer P 28; Reynolds Decl. PP 3-4.

At the time of that announcement; the Government refused to reveal the names of those who were arrested or detained, as well as the circumstances of their arrest and detention, including dates of arrest or release, locations of arrest and detention, and the nature of the charges filed.[3]

A. Plaintiffs' FOIA Request

On October 29, 2001, Plaintiffs submitted three letters to DOJ, sending one to the FBI, another to the Office of Information Privacy ("OIP"), and the third to the Immigration

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[3] Numerous groups, including various Plaintiffs, have voiced fears that the arrests were based on racial, religious, and ethnic profiling. They sought this information in order to determine if these fears were justified.

and Naturalization Service ("INS"), requesting information about those arrested by the Government in connection with its September 11 investigation. Specifically, they sought disclosure of the following four categories of information:

> 1. Identities of each [detainee], the circumstances of their detention or arrest, and any charges brought against them. In particular, (1) their names and citizenship status; (2) the location where each individual was arrested or detained initially and the location where they are currently held; (3) the dates they were detained or arrested, the dates any charges were filed, and the dates they were released, if they have been released; and (4) the nature of any criminal or immigration charges filed against them or other basis for detaining them, including material witness warrants and the disposition of any such charges or warrants.
>
> 2. The identities of any lawyers representing any of these individuals, including their names and addresses.
>
> 3. The identities of any courts, which have been requested to enter orders sealing any proceeding in connection with any of these individuals, any such orders that have been entered, and the legal authorities that the government has relied upon in seeking any such secrecy orders.
>
> 4. All policy directives or guidance issued to officials about making public statements or disclosures about these individuals or about the sealing of judicial or immigration proceedings.

Pls.' Mot., Ex. 10. Plaintiffs also requested expedited

processing of their FOIA request.

On November 1, 2001, OIP advised Plaintiffs that their request for expedited processing had been granted on the ground that the request involved a "matter of widespread and exceptional media interest in which there exists possible questions about the government's integrity which affect public confidence." Def.'s Mot., Ex. 4, attachment B (citing 28 C.F.R. § 16.5(d)(1)(iv) (2001)).

The INS responded on November 23, 2001, granting expedited treatment of Plaintiffs' FOIA request and requesting that Plaintiffs narrow the scope of their request. See Declaration of Raymond Holmes ("Holmes Decl.") P 7, attachment F. (attached as Ex. 3 to Def.'s Mot.).

The FBI responded to Plaintiffs' FOIA request on November 1, 2001, indicating that it had reviewed Plaintiffs' request on an expedited basis and that all "material responsive to [plaintiffs'] request was being withheld pursuant to [Exemption 7(a)]" of FOIA.. *See* Declaration of Scott A. Hodes ("Hodes Decl.") P 4 (attached as Ex. 2 to Def.'s Mot.) - Plaintiffs appealed, and on December 10, the FBI affirmed its denial under both Exemptions 7(A) and 7(C), 5 U.S.C. § 552(b)(7)(A), (C). Hodes Dec. P 4.

B. Information Disclosed by DOJ

The Government asserts that those it has arrested and detained fall into one of three categories: (1) persons held on immigration-related charges by INS; (2) persons charged with federal crimes; and (3) persons held on material witness warrants. DOJ has released the following information about each of the three categories of detainees.

1. Immigration Detainees

The Government has detained a total of 751 individuals on immigration violations over the course of its investigation. See Def.'s Response to the Court's Order of May 31, 2002. As of June 13, 2002, the number of people still being held in INS custody was 74.[4] *Id.*

For 718 of the 751 individuals detained, DOJ has revealed their place of birth and citizenship status, as well as the dates any immigration charges were filed, and the nature of those charges. *See* Def.'s Mot., Ex. 6 ("INS Special Interest List: Joint Terrorism Task Force Working Group"). The Government has withheld the names of those detained, the dates and locations of their arrest and detention, the dates of release for those 677 who were released,[5] and the identities of their lawyers.

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[4] DOJ acknowledged that "many [of the INS related detainees] have [been] . . . cleared of any wrongdoing." Def.'s Mot. at 23. On July 1, 2002, 130 Pakistanis who had been held on visa violations and other charges were deported to Pakistan under an agreement between the U.S. government and the Pakistani Embassy. Of the 131 sent home, 110 were convicted of immigration violations and 22 were convicted of credit card fraud, possession of narcotics, robbery or assault. None was linked to the terrorist attacks on the World Trade Center and the Pentagon. *See* Steve Fainaru, U.S. Deported 131 Detainees in Secret Airlift; Diplomatic Issues Cited; No Terrorist Ties Found, Washington Post, July 10, 2002, at A1; *see* Susan Sachs, Traces of Terror: The Detainees; U.S. Deports Most of Those Arrested In Sweeps After 9/11, N.Y. Times, July 11, 2002, National Desk; Scores of Pakistanis Are Deported By U.S., N.Y. Times, July 10, 2002, at A10.

[5] This number is derived from the figures provided in Def.'s Response to the Court's Order of May 31, 2002. Defendant indicated therein that as of June 11, 2002, only 74 of the total 751 detainees were still in custody

2. Federally Charged Detainees

A total of 129 people have been detained on federal criminal charges since September 11, 2001. As of June 11, 2002, 73 individuals remained in detention on criminal charges. Def.'s Response to the Court's Order of May 31, 2002 at 2. Only one of these has been charged in connection with the September 11 attacks.[6] *See* Reynolds Decl. P 27.

DOJ has released the names of all individuals federally charged, with, the exception of one defendant whose case is sealed by court order. *See* Def.'s Response to this Court's Order of May 31, 2002. Defendant also released the dates charges were filed; the nature of the charges filed; the dates any detainees were released; and their lawyers' identities. The Government continues to withhold information concerning dates or locations of arrest as well as the dates and locations of detention.

3. Material Witness Detainees

With respect to those held on material witness warrants, DOJ has withheld all information, including the number of individuals detained on material witness warrants, their names, citizenship status and place of birth, dates and location of their arrest and detention, and their lawyers' identities.

4. Policy Directives and Guidance

DOJ has released only two documents in response to

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[6] This individual is Zaccharias Moussaui, who was apprehended prior to September 11, 2001. No individual arrested after the attacks on September 11, 2001, has been charged in connection with those attacks. *See* Reynolds Decl. P 27.

Plaintiffs' request for "policy directives or guidance" concerning the detainees. One is a heavily redacted document entitled "draft talking points," which contains guidelines that DOJ personnel must follow when making public statements about the detainees. *See* Declaration of Melanie Ann Pustay P 6 ("Pustay Decl.") (attached as Ex. 8 to Def.'s Reply). The other is a memorandum from the Chief Immigration Judge to all immigration judges and court administrators reminding them that immigration hearings are to be closed to the public. *See* Pls.' Mot., Ex. 57.

5. Total Numbers of Detainees

Finally, DOJ has withheld the total number of individuals arrested and detained in connection with its September 11 investigation.[7]

II. STANDARD OF REVIEW

Summary judgment will be granted when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

In FOIA cases, the Court may grant summary judgment on the basis of government affidavits or declarations that explain why requested information falls within a claimed exemption,

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[7] On November 5, 2001, DOJ indicated that 1,182 people had been detained. On November 8, 2001, DOJ announced that it would no longer provide a running total of all individuals detained in connection with the investigation, but only of those charged with federal crimes or immigration violations, and that it would only release information on the number of detainees currently in custody, and not the total number detained in the course of the investigation. *See* Pls.' Mot. at 4, Ex. 19.

as long as the affidavits or declarations are sufficiently detailed, non-conclusory, and submitted in good faith, and as long as a plaintiff has no significant basis for questioning their reliability. *Golandv. CIA*, 197 U.S. App. D.C. 25, 607 F.2d 339, 352 (D.C. Cir. 1978); *see also Coastal States Gas Corp. v. United States Dep't of Energy*, 199 U.S. App. D.C. 272, 617 F.2d 854, 861 (D.C. Cir. 1980). In determining whether the government may properly withhold requested information under any of FOIA's exemptions, the district court conducts a de novo review of the government's decision. 5 U.S.C. § 552(a)(4)(B).

III. ANALYSIS

As of this moment, the public does not know how many persons the Government has arrested and detained as part of its September 11 investigation; nor does it know who most of them are, where they are, whether they are represented by counsel, and if so, who their counsel are. Plaintiffs rely on FOIA, as well as the First Amendment and common law, to obtain this information.

The fundamental purpose of FOTA is to lift the veil of "secrecy in government." *Reporters Committee*, 489 U.S. at 772-773 (internal citations omitted). To that end, FOIA is designed to "'open[ ] up the workings of government to public scrutiny'" through the disclosure of government records. *McGehee v. CIA*, 225 U.S. App. D.C. 205, 697 F.2d 1095, 1108 (D.C. Cir. 1983) (internal citation omitted) In order to accomplish that goal, the Act mandates "full agency disclosure unless information is exempted under clearly delineated statutory language." *Reporters Committee*, 489 U.S. at 773 (emphasis added). In short, the Government bears the burden of proving why information should not be disclosed to the public.

The Government invokes Exemptions 7A, 7C and 7F of FOIA, which protect from disclosure any records or information "compiled for law enforcement purposes" whenever disclosure:

> (A) could reasonably be expected to interfere with enforcement proceedings, . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, . . . or (F) could reasonably be expected to endanger the life or physical safety of any individual.

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5 U.S.C. § 552 (b)(7)(A), (C), (F). Defendant also relies on Exemption 3 to withhold the identities of the material witnesses. That exemption permits the Government to withhold information that is protected by federal statute.

Before turning to the merits of these exemptions, the Court observes preliminarily that both parties have argued this case as if it were an "all or nothing" disclosure decision. The Government's main affidavits, for example, treat Plaintiffs' request for the detainees' names, their arrest and detention history, and their lawyers' names, as if it were an undifferentiated body of information. FOIA, however, requires a court to conduct a particularized and focused inquiry for each discrete category of information withheld by the Government. *See generally Vaughn v. Rosen*, 157 U.S. App. D.C. 340, 484 F.2d 820 (D.C. Cir. 1973); *Manna v. United States Dep't of Justice*, 51 F.3d 1158, 1163 (3rd Cir. 1995). The Court therefore will examine whether the Government's FOIA rationales support its withholding for each separate category of information in issue.

As explained below, the Court concludes that: (1) the

Government must release the identities of all individuals detained during the course of its September 11 investigation. To the extent that the Government contends certain material witness identities are sealed by court order, it must submit such orders for in camera inspection or provide supplemental affidavits clarifying the nature of those orders; (2) the Government has properly withheld the dates and locations of arrest, detention and release; (3) the Government must disclose the identities of counsel representing those detained; and (4) the Government has conducted an inadequate search with respect to its policy directives and must conduct an additional search of its records.

A. The Government Must Disclose the Names of The Detainees.

1. The Government Cannot Withhold the Names of the Detainees Under Exemption 7A.[8]

The Government devotes most of its briefing to FOIA Exemption 7A, which protects from disclosure any information "compiled for law enforcement purposes" whenever it "could reasonably be expected to interfere with enforcement

[8] [HN7] Before considering whether the subparts of Exemption 7 apply, a court must find that the information at issue was compiled for law enforcement purposes." There is no question that the Government's affidavits establish that the information sought in this case was gathered expressly for the legitimate law enforcement purpose of investigating the September 11, 2001 terrorist attacks. See Declaration of Dale L. Watson ("Watson Decl.") PP 2-7. (attached as Ex. 7 to Def.'s Reply); Reynolds Decl. PP 2-4.

proceedings . . . [9]

The Government affidavits provide three rationales in support of Exemption 7A. First, the detainees may be "knowledgeable witnesses," and disclosure of their names could "deter them from cooperating . . . once they are released from custody and impair their usefulness to the ongoing investigation." Reynolds Decl. PP 14-15; *see also* Supp. Reynolds Decl. P 6 In particular, the Government worries that upon learning that their members have been detained, "terrorist organizations . . . may refuse to deal further with [the detainees]," or may threaten them, thereby "eliminating valuable sources of information." *Id.*

Second, "releasing the names of the detainees who may be associated with terrorism . . . would reveal the direction and progress of the investigations by identifying where DOJ is focusing its efforts." Reynolds Decl. P 16. This could "allow terrorist organizations to map the progress of the investigation and thereby develop the means to impede them." Reynolds Decl. P 16; Suppl. Reynolds Decl. P 6; Watson Decl. P 15

Finally, "public release of names . . . could allow terrorist organizations and others to interfere with the pending proceedings by creating false or misleading evidence." Reynolds Decl. P 17.

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[9] [HN9] Although typically there must be a pending or a specific concrete prospective law enforcement proceeding" at issue, *see Carson v. U.S. Dep't of Justice*, 203 U.S. App. D.C. 426, 631 F.2d 1008, 1018 (D.C. Cir. 1980), Exemption 7A has also been extended to protect information related to ongoing investigations likely to lead to such proceedings, as in this case. *See Bevis v. Dep't of State*, 255 U.S. App. D.C. 347, 801 F.2d 1386 (D.C. Cir. 1986).

a. The Government Has Failed to Demonstrate that Disclosure Could Deter Cooperation.

The Government's first rationale -- that disclosure will deter cooperation because terrorist groups will intimidate or cut off contact with the detainees -- is unpersuasive for several reasons.

First, it assumes terrorist groups do not already know that their cell members have been detained. The Government has emphasized that the detainees are entitled to inform whomever they want of their detention. Given this option of "self-disclosure", and given that more than 10 months have passed since September 11, it is implausible that terrorist groups would not have figured out whether their members have been detained. Defendant has offered no reason to believe that terrorist groups would not know of the detentions.

Second, the Government's rationale is contradicted by its own extensive disclosures. The Government has released the names of individuals it has identified as members of al Qaeda or connected to that organization.[10] *See* Pls.' Supplemental Memorandum at 1-4. Moreover, at least 26 individuals held on material witness warrants have been publicly identified, and

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[10] It has arrested Issaya Nombo on immigration charges after a letter congratulating him on obtaining his pilot's license was discovered in a cave in Afghanistan. *Id.* It announced that it had captured Jose Padilla and was holding him as a material witness after a lead from Abu Zabaydah; Mr. Padilla was thought to be building a "dirty bomb" in the United States. *Id.* Most recently, it announced that it was holding Mohammad Mansur Jabarah on a material witness warrant, after arrested in connection with a terrorist plot in Singapore, and that he was providing valuable information regarding Al Qaeda's operations. *See generally*, William Rashbaum, Captured Qaeda Member Gives Details on Group's Operations, N.Y. Times, July 27, 2002, at A8.

the identities of others held on immigration charges have been disclosed, some reportedly by the Government. *Id.*; *see also* Pls.' Reply at 16, n.24. The Government does not explain why its concerns about cooperation apply with respect to some detainees, but not to other detainees whose identities have been disclosed. Cf. *Lederman v. United States*, 291 F.3d 36, 43 (D.C. Cir. May 31, 2002) (rejecting government's professed security concerns about persons engaged in First Amendment activity on Capitol Hill in light of its demonstrated lack of security concerns about tourists and pedestrians in same area)

Third, the Government has not met its burden of establishing a "rational link" between the harms alleged and disclosure. *Crooker v. Bureau of Alcohol. Tobacco and Firearms*, 252 U.S. App. D.C. 232, 789 F.2d 64, 67 (D.C. Cir. 1986). Obviously, the release of names would not deter cooperation or prevent detainees from providing valuable information to the Government unless those detained actually had some pre-existing link to or knowledge of terrorist activity.

The Government affidavits assume, but utterly fail to demonstrate, the existence of this link. The affidavits nowhere declare that some or all of the detainees have connections to terrorism. Nor do they provide facts that would permit the Court to infer links to terrorism. For example, the Government has provided no information on the standard used to arrest and detain individuals initially.[11] Nor has it provided a general description of evidence that it obtained confirming any initial suspicions of links to terrorism. Indeed, when asked by the

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[11] With respect to the INS detainees, Defendant states only that "these individuals were originally questioned because there were indications that they might have connections with, or possess information pertaining to, terrorist activity against the United States." Reynolds Decl. P 10; Watson Decl. P 8.

Court during the Motions Hearing to explain the standard used to arrest the detainees, or otherwise to substantiate the purported connection to terrorism, the Government was unable to answer. *See* Mot. Hearing Tr. 24:17-18 ("Your Honor, I don't have that information . . .").

The Government's only response is that it cannot "rule out" possible connections to terrorism for every detainee, and that "dire consequences . . . would flow from even one unnecessary disclosure." Def.'s Reply at 8, 15-17. The Government's response is flawed legally and factually.

Legally, it turns FOIA's presumption of disclosure on its head, requiring Plaintiffs to prove the absence of what the Government must show affirmatively in order to withhold the names. 5 U.S.C. § 552 (a)(4)(B) ("burden is on the agency to sustain" its decision to withhold information). Factually, the record shows that the Government has "ruled out" links to terrorism for hundreds of detainees. Only 74 of the original 751 INS detainees remain in custody. The remainder, some 677, have either been released or deported. Not one of these has been charged with terrorist activity.[12] *See* Def.'s Response to

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[12] Indeed, the Government's rationale that disclosure would deter the INS detainees from cooperating is also not supported by the case law. Nearly every relevant Exemption 7A case has involved actual witnesses or informants in an ongoing or "concrete prospective law enforcement proceeding." *Bevis*, 801 F.2d at 1389 (in case involving files related to the FBI's investigation of Americans murdered in El Salvador, "concrete prospective law enforcement proceeding" found because numerous convictions had recently been obtained and because many more suspects identified in FBI files); *N.L.R.B. v. Robbins Tire*, 437 U.S. 214, 239, 57 L. Ed. 2d 159, 98 S. Ct. 2311 (1978) (witness statements in pending unfair labor practice proceedings exempt until completion of NLRB hearing because "employers or . . . unions will coerce or intimidate employees and others who have given statements, in an effort to make them change their testimony"); *Alyeska Pipeline Service Company v. U.S. Environmental*

the Court's Order of May 31, 2002; Def.'s Mot., Ex. 6.

The Government affidavits offer no evidence that the INS detainees are actual witnesses or informants in any pending or concrete prospective proceeding. Moreover, the Court has uncovered, no FOTA case that would permit the Government to do what it wants to do here: withhold information simply because of the possibility, however remote, that the detainees (even those who have been released) have information that might, at a later date, aid the Government's intelligence gathering and law enforcement efforts.

Therefore, in the absence of an allegation of "reasonable specificity" that detainees have a connection to terrorism, the Government's concern that disclosure would deter cooperation and impair its investigation is pure speculation, and, with respect to the INS detainees, is actually belied by the record. *Campbell v. Department of Justice*, 334 U.S. App. D.C. 20, 164 F.3d 20, 30 (D.C. Cir. 1998) (speculative or conclusory affidavits do not support summary judgment).

b. The Government Has Failed to Demonstrate that Disclosure of Names Could Enable Terrorist Groups to Map Its Investigation.

The Government's second of three rationales for why disclosure could "interfere with enforcement proceedings" under Exemption 7A is that terrorists might "map the progress of the investigation, and . . . develop the means to impede it."

Protection Agency, 272 U.S. App. D.C. 355, 856 F.2d 309, 357 (D.C. Cir. 1988) (disclosure of documents pertaining to investigation of corporation that revealed which employees had supplied the documents could "subject them to potential reprisals and deter them from providing further information to EPA")

Reynolds Decl. P 16. Specifically, the Government advances a so-called "mosaic theory," and argues that no information may be disclosed because "bits and pieces of information that may appear innocuous in isolation, when assimilated with other information . . . will allow the organization to build a picture of the investigation and to thwart the government's attempts to investigate and prevent terrorism." Watson Decl. P 12. Defendant's reliance on the mosaic theory to withhold the detainees' names is misplaced for several reasons.

First, there is simply no existing precedent applying the mosaic theory to Exemption 7. What little precedent does exist applies to Exemption 1 cases, not Exemption 7 cases. *See. e.g., Abbotts v. Nuclear Regulatory Commission*, 247 U.S. App. D.C. 114, 766 F.2d 604 (D.C. Cir. 1985). Exemption 1 protects matters that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of the national defense or foreign policy." 5 U.S.C. § 552(b)(1). Exemption 1 cases receive considerable deference from the courts, which must give "substantial weight" to agency affidavits on national defense and foreign policy issues. *King v. Department of Justice*, 265 U.S. App. D.C. 62, 830 F.2d 210, 217 (D.C. Cir. 1987)[13] Significantly, the Government does not rely on Exemption 1 in this case.

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[13] Defendant relies primarily on *Halperin v. CIA*, 203 U.S. App. D.C. 110, 629 F.2d 144 (D.C. Cir. 1980), and *Halkin v. Helms*, 194 U.S. App. D.C. 82, 598 F.2d 1 (D.C. Cir. 1989). Neither is a FOIA case, and both involved security issues not alleged herein. Halperin involved interpretation of the National Security Act of 1947, 50 U.S.C. § 403 (d) (3), and Halkin addressed the "state secrets privilege," which according to our Circuit, "heads the list" of various privileges. *Halkin*, 598 F.2d at 8. In these contexts, as opposed to the Exemption 7 context, courts must accord "utmost deference" to executive assertions of privilege upon grounds of military or diplomatic secrets. 598 F.2d at 9.

Second, application of the mosaic theory would essentially turn 7A into an exemption dragnet, as it would permit the Government to lump together all information related to an ongoing government investigation and withhold it solely because innocuous parts of data might be pieced together by terrorist groups. This result is contrary to well-settled Exemption 7A case law.

Exemption 7A does not authorize "blanket exemptions" for "all records relating to an ongoing investigation" or "merely because [such information] relates to a pending investigation." *Campbell v. Department of Health and Human Services*, 221 U.S. App. D.C. 1, 682 F.2d 256, 259, 262 (D.C. Cir. 1982); *see also Crooker*, 789 F.2d at 66-67. Rather, the Government must divide the undisclosed information into "categories that are sufficiently distinct to allow a court to grasp 'how each . . . category of [information] if disclosed, would interfere with the investigation.'" *Bevis*, 201 F.2d at 1389 (D.C. Cir. 1986) (internal citations omitted) Application of the mosaic theory would allow the Government to sidestep this Exemption 7A requirement.

Finally, the key Government affidavit on the mosaic theory was not even prepared for this case, but rather is a copy of the affidavit prepared for an unrelated case filed in the Eastern District of Michigan.[14] *See generally* Watson Decl. That affidavit discusses the potential risks of opening deportation hearings and disclosing evidence, not disclosing

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[14] In that case, the district court granted a preliminary injunction ordering the opening of the deportation proceedings of one of the detainees. *See Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937 (E.D. Mich. Apr. 3, 2002). The Court of Appeals for the Sixth Circuit denied the Government's request for a stay of the preliminary injunction. *See Detroit Free Press v. Ashcroft*, 2002 U.S. App. LEXIS 10855, No. 02-1437, 2002 WL 1332836 (6th Cir. Apr. 18, 2002)

identities.[15] Virtually all of the evidence discussed in the affidavit is information not in issue in this case, such as how or when a given detainee entered the country or what the detainees have told the Government about the operations of terrorist cells: *See* Watson Decl. PP 12-13.

For these reasons, the Court concludes that the mosaic theory cannot justify the Government's wholesale withholding of names.

c. The Government Has Failed to Demonstrate that Disclosure of Names Could Enable Terrorist Groups to Create False and Misleading Evidence.

The third and final rationale the Government offers in support of the 7A withholdings of identities is that disclosure could "interfere with pending proceedings" by "creating false or misleading evidence." The Government's only supporting affidavit on the subject is the Reynolds Declaration,[16] which contains one conclusory sentence, and totally fails to explain

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[15] Those paragraphs that mention identities refer to a narrow subset of INS detainees. As of June 11, 2002, only 74 detainees remained in custody on INS violations; the rest have been cleared of wrongdoing and released, or deported.

[16] Nor is the Watson Declaration of help to the Government, as it too fails to discuss how disclosure of identities could result in evidence tampering. The declaration is limited to explaining how evidence concerning terrorist connections revealed during deportation hearings of certain INS detainees could lead to evidence tampering. *See* Watson Decl. P 16 ("For example, if evidence is disclosed that a particular detainee has funded a terrorist organization through a particular method or scheme, and the United States is now aware of that scheme, other individuals may destroy evidence of funding that organization."). This kind of information is not at issue in this case.

how disclosure of names per se would lead to the creation of false evidence. *See* Reynolds Decl. P 17. Nor is it apparent to the Court how release of only the names could possibly lead to evidence tampering.

For all the foregoing reasons, the Court finds that none of the Government's three rationales supports its withholding of the detainees' names under Exemption 7A.

2. The Government Cannot Rely on Exemptions 7C and 7F to Withhold the Identities of the Detainees.

The Government also relies on Exemptions 7C and 7F, arguing that the detainees' privacy interests and personal safety require that the names not be disclosed.

With respect to Exemption 7C, the Government argues that the detainees have a "substantial privacy interest" and that "release of their names . . . would forever connect them to the September 11 attacks . . . causing [] embarrassment, humiliation, risk of retaliation, harassment and possibly even physical harm." Reynolds Decl. P 19.

There is no question that there is a substantial privacy interest in not being associated with alleged criminal activity. *See. e.g.,* Stern v. FBI, 237 U.S. App. D.C. 302, 737 F.2d 84, 92 (D.C. Cir. 1984). However, Exemption 7C does not provide blanket protection to all information that could invade personal privacy. Indeed, if privacy concerns alone were sufficient, the Government could arrest and jail any person accused of a heinous crime and refuse to reveal his or her name to the public.

Instead, Exemption 7C requires a balancing of the "public interest in disclosure" against the "privacy interests implicated"

so that only information "constituting an unwarranted invasion" of privacy will be withheld. 5 U.S.C. § 552(b)(7)(C) (emphasis added); *Stern*, 737 F.2d at 92. The public's interest in disclosure lies in "opening agency action to the light of public scrutiny" and revealing what the "Government is up to." *Reporters Committee*, 489 U.S. at 772; *Safecard Services. Inc. v. SEC*, 288 U.S. App. D.C. 324, 926 F.2d 1197, 1206 (D.C. Cir. 1991) (evidence of government misconduct cannot be withheld under 7C)

The federal Government's power to arrest and hold individuals is an extraordinary one. Here, the Government has used its arrest power to detain individuals as part of an investigation that is widespread in its scope and secrecy. Plaintiffs voice grave concerns about the abuse of this power, ranging from denial of the right to counsel and consular notification, to discriminatory and arbitrary detention, to the failure to file charges for prolonged periods of detention, to mistreatment of detainees in custody.[17] *See* Pls.'s Reply at 11-13; Pls.' Mot. at 20-32. The concerns are sufficiently

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[17] The Government dismisses most of this evidence as unsubstantiated hearsay. Plaintiffs have not only offered numerous media reports documenting abuses, but also first-hand accounts given to Congress, the media, and human rights groups, including Amnesty International. See Pls.' Mot., Ex. 56 ("Testimony of Gerald H. Goldstein, Esq. before the Committee on the Judiciary of the United States Senate, Dec. 4, 2001) at 1-3; Ex. 32 ("Testimony of Michael Boyle, Esq. before the Committee on the Judiciary of the United States Senate, December 4, 2001) pp. 4-5; 3; see also Amnesty International's Concerns Regarding Post, September 11 Detentions in the USA (AI Report) (March 14, 2002), available at <http://www.amnesty-usa.org/usacrisis/9.11.detentions2.pdf>. In addition, three of the INS detainees who were deported have now filed lawsuits outlining the abuses. See Complaint filed on April 17, 2002 in Turkmen v. Ashcroft, 02-CV-02307-JG (E.D.N.Y 2002), available at <http://news.findlaw.com/hdocts/docs/terrorism>; Cf. *United States v. Awadallah, 202 F. Supp. 2d 55, 61* (S.D.N.Y. January 31, 2002).

substantial that DOJ's Office of 'the Inspector General has initiated an investigation into the Government's treatment of the detainees. *See* Def.'s Reply at 22, n.10. Unquestionably, the public's interest in learning the identities of those arrested and detained is essential to verifying whether the Government is operating within the bounds of the law.

However, it must be acknowledged that concern about the privacy and the safety of the detainees -- both in this country and abroad – is not without merit. Specifically, with respect to Exemption 7F, the Government states that "revealing the identities could subject them to physical danger both in the United States and in their home countries." Reynolds Decl. P 37.

Therefore, in view of the detainees' interests in privacy and legitimate concerns about their personal safety, and in view of the Court's obligation to balance the privacy interests against the public's interest, the Court concludes that detainees wishing to keep their name confidential may "opt out" of public disclosure by submitting to the Government a signed statement requesting that their identities remain confidential. For all other detainees, Exemptions 7C and 7F do not justify the Government's withholding of names.

3. The Government Cannot Rely on Exemption 3 to Withhold the Identities of Material Witnesses.

Exemption 3 exempts from disclosure information that is protected by any federal statute. The Government argues that Fed. R. Crim. P. 6(e)(2) and (e)(6), which are federal laws that mandate secrecy in grand jury proceedings, bar disclosure under Exemption 3.

As an initial matter, the Court observes that the

Government's treatment of material witness information is deeply troubling. A person apprehended as a material witness is not accused of any crime but, instead, has been arrested because it is believed that his or her "testimony is material in a criminal proceeding." 18 U.S.C. § 3144. Furthermore, such person may only be detained until "testimony can adequately be secured by deposition," after which he or she must be released. *Id.* Nevertheless, the Government has kept secret virtually everything about these individuals, including the number of people arrested and detained; as well as their identities. The public has no idea whether there are 40, 400, or possibly more people in detention on material witness warrants.

The Government's reliance on grand jury secrecy rules to justify withholding the identities of material witnesses is fundamentally wrong as a matter of law. First, on its face, Fed. R. Crim. P. 6(e) does not bar disclosure of the identities of persons detained as material witnesses. Fed. R. Crim. P. 6(e)(2) prohibits disclosure of "matters occurring before the grand jury." Fed. R. Crim. P. 6(e)(6) provides that "records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury."

Second, Plaintiffs have asked for the identities of those held on material witness warrants. They have not asked for the identities of grand jury witnesses. Nor is there necessarily an overlap between the two. In fact, the material witness statute itself refers to criminal proceedings generally; it says nothing about grand jury proceedings. *See* 18 U.S.C. § 3144 (referring generically to persons whose "testimony . . . is material in a criminal proceeding"). To the extent that there might be overlap, the Government can reveal the names of material witnesses without revealing any information about their status

as grand jury witnesses.[18]

Aside from its own identification of some of these individuals as possible grand jury witnesses at the time of their arrest, *see* Second Supp. Reynolds Decl. P 4 (attached to Def.'s Reply, Ex. 10), the Government has drawn absolutely no connection between disclosure of the names of those detained and a protected aspect of a specific or pending grand jury investigation. *Id.*

Third, the affidavits do not establish that those held as material witnesses are in fact grand jury witnesses. There is no indication in the Government affidavits that the material witnesses have testified before a grand jury, are scheduled to testify before a grand jury, or have been subpoenaed or otherwise ordered to testify.[19] In fact, it is publicly known that

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[18] Moreover, the Government cannot "immunize" identities from disclosure by publicizing the link between grand jury witnesses and material witnesses. *See Washington Post Co. v. Department of Justice*, 274 U.S. App. D.C. 190, 863 F.2d 96, 100 (D.C. Cir. 1988) ("the document itself must reveal the inner workings [of the grand jury]; the government cannot immunize a document by publicizing the link"). Indeed, any "information . . . [which can] be revealed in such a manner that its revelation would not elucidate the inner workings of the grand jury" is not exempted. *Senate of Puerto Rico v. Dep't of Justice*, 262 U.S. App. D.C. 166, 823 F.2d 574, 582 (D.C. Cir. 1987). Otherwise, the Government could "shield information from public view . . . by the simple expedient of presenting it to the grand jury." *Id.*

[19] The Second Supplemental Declaration of James Reynolds is the only declaration to mention this issue: "each of these warrants was issued to procure a witness's testimony before a grand jury." Second Supp. Reynolds Decl. P 4. This statement, however, does not establish that the detained witnesses have actually testified before a grand jury or are even scheduled to testify. It says only that at the time of their arrest shortly after September 11, there was the possibility that they would at some later point be grand jury witnesses.

at least eight, possibly more, material witnesses who were apprehended as potential grand jury witnesses were released and never testified before a grand jury. *See* Pls.' Reply at 17, n.25.

Finally, the identities of at least 26 individuals who have been held on material witness warrants have already been publicly disclosed. *See* Pls.' Reply at 16-17. The Government's own announcements of the identities of material witnesses undercuts their reliance on Fed. R. Crim P. 6(e). *See In re Petition of Craig*, 131 F.3d 99, 107 (2d Cir. 1997) ("The extent to which the grand jury material [is] . . . public is clearly relevant because even partial previous disclosure often undercuts many of the reasons for secrecy."); *see* In re: *SEALED CASE NO. 99-3091*, 338 U.S. App. D.C. 158, 192 F.3d 995 (D.C. Cir. 1999) (name of grand jury witness not covered by Rule 6(e) because identity as a witness was publicly known).

Accordingly, for the foregoing reasons, the Government has not met its burden of showing that disclosure of material witness identities would reveal some "secret aspect of the grand jury's investigation" and may therefore not rely on R. 6(e) and Exemption 3 to justify its across-the-board withholding of the names of all material witnesses.

4. The Government Cannot Rely on Sealing Orders to Withhold the Identities of Material Witnesses[20]

The Government's final argument in support of its

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[20] The Government contends there is only one sealed case among the detainees facing criminal charges. See Def.'s Response to this Court's Order of May 31, 2002. The Government properly withheld the identity of this detainee.

decision to withhold identities is that certain federal court orders prohibit it from releasing the identities of some, if not all material witnesses. The Second Supplemental Reynolds Declaration states: "the foregoing material witness warrants are governed by court orders prohibiting the government from releasing any information about these proceedings. The exact language of these orders varies but the Department of Justice interprets such orders to protect from disclosure not only the contents of the warrants but the very fact of the existence of the warrants." *See* Second Supp. Dec. P 6.

The meaning of this statement is unclear. For example, does it mean that: (1) each federal court that issued a material witness warrant also issued a separate sealing order with respect to such witness; (2) courts in criminal cases in which material witnesses have testified hive sealed those proceedings; or (3) DOJ is interpreting material witness warrants themselves as sealing orders simply because it believed that those individuals could be grand jury witnesses in the future? Compare Reynolds Decl. P 32 ("The United States District Courts before which the material witnesses have appeared have issued sealing orders prohibiting the government from releasing any information about these proceedings."), with Def.'s Reply at 33 ("A material witness warrant is issued by a court and therefore qualifies as an 'order' required to remain under seal [pursuant to Fed. R. Crim. P. 6(e)]").

Without further clarification of the court orders referred to, this Court cannot ascertain whether Defendant has properly withheld the identities of material witnesses on this ground.

Accordingly, insofar as the Government is relying on court orders, it may either submit those orders in camera or provide a supplemental affidavit explaining the nature and legal basis for these sealing orders.

B. The Government Has Properly Withheld the Dates and Locations of Arrest, Detention, and Release.

With respect to the dates and locations of arrest, detention, and release, the Court finds that the record is sufficient to support the Government's withholding under Exemptions 7A and 7F.

First, with respect to Exemption 7A, the Government has argued that detailed informa ion of this nature could interfere with the investigation because it would "inform organizations of routes of investigation that were followed but eventually abandoned . . . could provide insights into the past and current strategies and tactics of law enforcement agencies conducting the investigation." Supp. Reynolds Decl. P 6.

Defendant has emphasized that dates and locations would be particularly valuable to anyone attempting to discern patterns in the Government's investigation and strategy. For example, the Government states that "revealing that in a certain city, on a certain date, a certain number of people were detained, could be extremely useful information to terrorist organizations." Motions Hearing Tr. at 27:14-17; *Id.* at 16:22-25 ("Your Honor, even with those particular [public] indictments, the dates that the individuals were detained, the locations at which they were arrested, things of that nature, we have not provided because that is information that would fit into the mosaic.")

Second, the Government has emphasized that disclosure of locations would place the "life or physical safety" of many people at risk because it would make detention facilities vulnerable to retaliatory attacks, and "place at risk not only [] detainees, bu[illegible]he facilities themselves and their employees." Reynolds Decl. P 37.

Accordingly, in the absence of any contrary evidence, or any reason to discredit the Government's representations regarding this information, the Court finds that the dates and locations of arrest, detention, and release were properly withheld.

C. The Government Must Disclose the Identities of the Detainees' Attorneys.

The Government has withheld the identities of counsel for the detainees held on immigration violations and material witness warrants under Exemptions 7A, 7C, and 7F.

With respect to 7A, the Government's affidavits are facially insufficient. The only justification the Government offers is the following conclusory comment: "the rationale that underlies the withholding of the names of the detainees similarly supports the non-disclosure of their lawyers' identities." Reynolds Decl. P 18. Since the Court has rejected the 7A rationales as applied to the detainees' identities, those rationales will obviously not support the Government's withholding of the attorneys' identities.

With respect to Exemptions 7C and 7F, the Government asserts that if the attorneys' identities are revealed, they could be subject to professional humiliation or physical harm (either from angry citizens or from terrorist organizations)[21] *See* Reynolds Decl. PP 25, 38.

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[21] Specifically, with respect to 7C, Defendant states that: "the overwhelming grief and anger felt by the American people could be directed at these attorneys even more strongly than at the detainees themselves." Reynolds Decl. P 25. In addition,' "[the attorneys] run the risk that they will be subjected to harassment or retaliation." *Id.* P 26.

Similarly with respect to 7F, Defendant states: "some might construe the attorneys as working against the interests of the United States and seek to retaliate against them. Also, members of terrorist organizations may fear that detainees are supplying their attorneys with too much information and, lacking the ability to get at the detainees while they are imprisoned, may instead choose to harm their attorneys." Reynolds Decl. P 38.

First, it is worth noting that lawyers are a hardy brand of professionals. The legal profession has a long and noble history of fighting for the civil liberties and civil rights of unpopular individuals and political causes, ranging from their advocacy on behalf of WWI dissidents, to their resistance to McCarthy era abuses, to the defense of persons accused of heinous capital crimes.

Second, Defendant's rationale erroneously assumes that lawyers, like suspects or defendants, have an expectation of anonymity; they do not. Nor has the Government offered any contrary evidence or suggested that the lawyers representing the detainees expected that their names would remain confidential. In fact, the names of many lawyers are already publicly known, and there is nothing in the record to suggest that any of the harms prophesied by the Government have occurred.

Third, the Government's recitation of harms is totally speculative, with no factual basis. For example, Defendant states that "some might construe the attorneys as working against the interests of the United States" and therefore "seek to retaliate." Reynolds Decl. P 25. Not only is there no evidence of such retaliation, but the Government assumes, without any support, that citizens do not understand the role of defense lawyers in the American system of justice.

For the foregoing reasons, the Court finds that Exemptions 7A, 7C, and 7F do not protect the identities of the attorneys. Defendant must therefore disclose the identities of the detainees' attorneys.

D. The Government Did Not Conduct an Adequate Search for Documents.

Finally, Plaintiffs challenge the adequacy of Defendant's search for documents responsive to their request for "all policy directives and guidance issued to officials about making public statements or disclosures" about the detainees or about "sealing judicial or immigration proceedings." As noted earlier, the Government released the following two documents in response to Plaintiffs' request: (1) a heavily redacted, two-page document from DOJ entitled "draft talking points" for the Attorney General; and (2) a memorandum via electronic mail from Chief Immigration Judge Michael Creppy to "All Judges; Court Administrators" dated September 21, 2001. Pls.' Reply, Ex. 57.

"'It is elementary that an agency responding to a FOIA request must conduct[] a search reasonably calculated to uncover all relevant documents.'" *Truitt v. Dep't of State*, 283 U.S. App. D.C. 86, 897 F.2d 540, 542 (D.C. Cir. 1990) (internal citations omitted) Affidavits attesting to the sufficiency of an agency's search must be detailed and non-conclusory. *Oglesby v. Dep't of the Army*, 287 U.S. App. D.C. 126, 920 F.2d 57, 68 (D.C. Cir. 1990).

Upon review of the affidavits submitted, it is clear that the Government has failed to satisfy its obligation to search in a manner "reasonably calculated to uncover" responsive documents.

First, the affidavits indicate that the FBI did not conduct any search at all, let alone one that was "reasonably calculated" to uncover responsive documents. The FBI's declaration states only that after "consultation [with Mr. Collingwood, an FBI Assistant Director], it was determined that the FBI did not have documents responsive to this part of plaintiffs' FOIA request." (emphasis added). *See* Supp. Declaration of Scott A. Hodes, P 3 (attached as Ex. 9 to Def.'s Reply). The declaration says nothing about whether anyone within the FBI conducted a search; nor does it provide an explanation as to why no search was conducted.

Second, the declaration that purports to explain searches conducted within other parts of the Department of Justice also suffers from major deficiencies. Although the agency declaration indicates that three offices within DOJ conducted searches, namely the Office of Information Privacy, the Office of the Attorney General, and the Office of the Deputy Attorney General, no details are provided about how these searches were performed. *See* Pustay Decl. PP 1,6; *see also Oglesby*, 920 F.2d at 68 ("A reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials. . . were searched, is necessary"). Incredibly, the only item recovered within the entire Department of Justice, was a two-page document, entitled "draft talking points" for the use of the Attorney General. A redacted copy was provided to Plaintiffs on January 11, 2002.

Third, the other document disclosed to Plaintiffs clearly indicates the existence of earlier relevant documents, none of which were disclosed. A memorandum from Chief Immigration Judge Michael Creppy sent electronically to "All Judges; Court Administrators" dated September 21, 2001 states that "as [some of the recipients] already know," the Attorney

General "has implemented . . . procedures [that] require us. . . to close the hearings to the public, and to avoid discussing the case or otherwise disclosing any information about the case to anyone outside the Immigration Court." *See* Pls.' Mot., Ex. 57. Defendant had an obligation, after discovery of this document, to search for additional responsive information about those "procedures". *Campbell*, 164 F.3d at 28 (an agency "must revise its assessment of what is 'reasonable' in a particular case to account for leads that emerge during its inquiry.")

Finally, it is simply not credible that no other documents are responsive to Plaintiffs' request. Somehow all United States Attorneys Offices, all FBI offices, all INS offices, and all DOJ offices throughout the United States were told that matters related to those apprehended in connection with September 11, were to remain secret. How was this directive communicated? The Government never explains how widespread notification was accomplished without the use of a single document produced under FOIA.

For the foregoing reasons, the Court concludes that the Government's search for "all policy directives and guidance issued to officials about making public statements or disclosures" with respect to the detainees or about "sealing judicial or immigration proceedings" was inadequate. The Government must conduct another search.

To summarize the Court's FOIA conclusions, the Court finds that: (1) Exemptions 7 and 3 do not protect the identities of the detainees from disclosure. The Government must therefore release within fifteen days a comprehensive list of names of those individuals it has arrested and detained in connection with its investigation into the events of September 11, 2001 with two exceptions. With respect to the court orders purportedly barring disclosure, the Government must submit

within fifteen days the orders for in camera review or a supplemental declaration. Any detainee wishing to keep his or her name confidential may do so by submitting a signed statement to the Government requesting such confidentiality; (2) Exemptions 7A and 7F protect from disclosure the dates and locations of arrest, detention, and release of the detainees; (3) Exemptions 7A, 7C and 7F do not protect the identities of any of the attorneys of the detainees. The Government must release within fifteen days the names of those attorneys; and (4) the Government's search with respect to policy directives and guidance was inadequate. The Government must conduct an additional search for these documents and file a supplemental report with the Court within thirty days.

E. The First Amendment and Common Law Do Not Entitle Plaintiffs to the Remaining Information.[22]

Plaintiffs also claim that the First Amendment and common law entitle them to the dates and locations of arrest, detention and release.

It has long been recognized that the public has a First Amendment right of access to criminal proceedings,[23] civil

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[22] It must be noted that the parties devoted little attention to these claims in their briefs.

[23] *See Richmond Newspapers v. Virginia*, 448 U.S. 555, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980) (criminal trial); *Globe Newspaper Company v. Superior Court*, 457 U.S. 596, 73 L. Ed. 2d 248, 102 S. Ct. 2613 (1982) (same); *Press-Enterprise v. Superior Ct.*, 478 U.S. 1, 92 L. Ed. 2d 1, 106 S. Ct. 2735 (1986) ("Press-Enterprise II") (preliminary criminal proceedings); *Press-Enterprise v. Superior Ct.*, 464 U.S. 501, 78 L. Ed. 2d 629, 104 S. Ct. 819 (1984) ("Press-Enterprise I") (voir dire proceedings)

proceedings,[24] and to "receive information and ideas" pertaining to the conduct of public affairs. *Kleindienst v. Mandel*, 408 U.S. 753, 762, 33 L. Ed. 2d 683, 92 S. Ct. 2576 (1972). This right derives from the core purpose of the First Amendment, which is to ensure "freedom of communication on matters relating to the functioning of government." *Richmond Newspapers. Inc. v. Virginia*, 448 U.S. 555, 575, 65 L. Ed. 2d 973, 100 S. Ct. 2814.

However, the First Amendment is not coterminous with FOIA, and it does not "mandate a right of access" to all "government information." *Richmond Newspapers*, 448 U.S. at 583, n.1 (Stevens, J., concurring); *Houchins v. KQED*, 438 U.S. 1, 15, 57 L. Ed. 2d 553, 98 S. Ct. 2588 (1978). To determine whether there is a 1st Amendment right of access, the Supreme Court has relied upon two complementary considerations: first, whether there is "a tradition of accessibility" or, in other words, a historical presumption, of access to such information; and second, whether access to the proceedings or records would contribute to the self-governing

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[24] *Publicker Industries v. Cohen*, 733 F.2d 1059, 1070 (3rd Cir. 1984) (First Amendment secures to the public and the press a right of access to civil proceedings because "a presumption of openness inheres in civil trials as well as criminal trials. We [] conclude that the civil trial, like the criminal trial, 'plays a particular significant role in the functioning of the judicial process and the government as a whole.'") (internal citations omitted); *Brown v. Williamson Tobacco v. FTC*, 710 F.2d 1165, 1178 (6th Cir. 1983) ("The Supreme Court's analysis of the justifications for access to the criminal courtroom apply as well to the civil trial . . . The concern of Justice Brennan that secrecy eliminates one of the important checks on the integrity of the system applies no differently in a civil setting."); cf. *Press-Enterprise I*, 464 U.S. at 516 ("the distinction between trials and other official proceedings is not necessarily dispositive, 'or even important, in evaluating the First Amendment issues.") (Stevens, J., concurring); *Richmond Newspapers*, 448 U.S. at 580, n.17 ("historically both civil and criminal trials have been presumptively open")

function and further the democratic process. *Richmond Newspapers*, 448 U.S. at 589 (Brennan and Marshall, JJ., concurring)

Applying these principles, the Court finds that while it may be true that the fact of an individual's arrest has always been public,[25] there is no argument or record evidence supporting the conclusion that "a tradition of accessibility" attaches to the dates and location of arrest, detention, or release.

Furthermore, Defendant has submitted several affidavits establishing the existence of an important governmental interest. The information sought may be used to map the progress of the Government's law enforcement investigation, and place at risk the detention facilities as well as the physical safety of the detainees and employees. *See* Supp. Reynolds Decl. P 6; Watson Decl. P 12. Finally, Plaintiffs have not Offered - and the Court cannot discern - a "less restrictive" means of securing this interest, other than to withhold this information. *Globe Newspaper*, 457 U.S. at 607-8.

2. Common Law

Nor does the federal common law right of access to "inspect and copy public records, and documents," *Nixon v. Warner Comm. Inc.*, 435 U.S. 589, 597, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978), permit release of this information. Even assuming this information can be considered "public record," the Court finds that the Government's asserted interest in withholding these particular categories of information greatly

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[25] *See Reporter's Committee*, 489 U.S. at 753 (police blotters are vastly different from rap sheets because "arrests, indictments, convictions, and sentences are public events that are usually documented in court records.")

outweighs the public interest in obtaining it.

The harms the Government forecasts are significant. At the same time, given that the identities of the detainees will be disclosed, the Court sees no added benefit to the public interest in disclosure of the dates and location of arrest and detention. Plaintiffs have not indicated how the public interest would be furthered by the additional disclosures of dates and locations of arrest and detention.

IV. CONCLUSION

For the foregoing reasons, the Court **grants in part and denies in part** Defendant's Motion for Summary Judgment, and **grants in part and denies in part**, Plaintiffs' Motion for Summary Judgment.

First, with respect to the identities of the detainees, Defendant's Motion is **denied**, and Plaintiffs' Cross-Motion is **granted**. Defendant shall disclose within fifteen days the names of those it has arrested and detained in connection with its September 11, 2001 terrorist investigation. With respect to those detainees for whom the Government contends disclosure is barred by court order, the Government must submit the orders for in camera review or provide a supplemental declaration within fifteen days. Furthermore, any detainee wishing to withhold his or her name from public disclosure can submit a signed statement to the Government requesting confidentiality of their identity. The Government shall provide sealed copies of these statements to the Court in support of its disclosures to Plaintiffs.

Second, with respect to the dates of arrest, detention, and release as well as the location of arrest and detention, Defendant's Motion for Summary Judgment is **granted**, and

Plaintiffs' Motion for Summary Judgment is **denied**. Defendant has properly withheld this information under Exemptions 7A and 7F. Neither the First Amendment nor the common law right of access entitles Plaintiffs to this information.

Third, with respect to the names of the detainees' lawyers, Defendant's Motion is **denied**, and Plaintiffs' Motion is **granted**. Defendant shall disclose the names of the detainees' attorneys within fifteen days.

Finally, Defendant's search for information in response to Plaintiffs' request for policy directives was inadequate. Defendant must conduct a new search within thirty days.

GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

ORDER

The matter is before the Court on Defendant's Motion for Summary Judgment ("Def.'s Mot.") and Plaintiffs' Cross-motion for Summary Judgment ("Pls.' Mot."). Upon consideration of the motions, oppositions, replies, the Motions Hearing held in this matter on May 29, 2002, the amicus brief submitted by the Washington Legal Foundation, and the entire record herein, and for the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED, that Plaintiffs' Motion is **granted** and Defendant's Motion is **denied** with respect to the identities of the detainees. Defendant shall disclose **within fifteen days** the names of those it has arrested and detained in connection with its September 11, 2001 terrorist investigation with the following two exceptions. With respect to the names of detainees for whom the Government contends court orders prohibit disclosure, the Government must submit those orders for in camera review or provide a supplemental declaration within fifteen days. Any detainee wishing to withhold his or her name from public disclosure can submit a signed statement to the Government requesting confidentiality of their identity. The Government shall provide within fifteen days sealed copies of these statements to the Court in support of its disclosures to Plaintiffs; it is further

ORDERED, that with respect to the dates of arrest, detention, and release as well as the location of arrest and detention, Defendant's Motion is **granted**, and Plaintiffs' Motion is **denied**. Defendant has properly withheld this information under Exemptions 7A, 7C and 7F. Neither the First Amendment nor the common law right of access entitles Plaintiffs to this information; it is further

ORDERED, that with respect to the names of the detainees' lawyers, Defendant's Motion is **denied**, and Plaintiffs' Motion is **granted**. Defendant shall disclose the names of the detainees' attorneys within fifteen days; it is further

ORDERED, that Defendant's search for information in response to Plaintiffs' request for policy directives was inadequate. Defendant must conduct a new search within thirty days.

DATED August 02, 2002
GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

Appendix C

Statutory Provisions Involved

Title 5. Government Organization and Employees
Part I – The Agencies Generally
Chapter 5 – Administrative Procedure
Subchapter II– Administrative Procedure

5 U.S.C. § 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

* * * *

(3)(A) * * * * each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

* * * *

(b) This section does not apply to matters that are–

* * * *

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, * * * * (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, * * * * (F) could reasonably be expected to endanger the life or physical safety of any individual;

* * * *

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted shall be indicated at the place in the record where such deletion is made.

* * * *

U.S. Const. amend. I. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR NATIONAL SECURITY STUDIES, ET AL.	)
Plaintiffs,	)
v.	) Civil Action No. 01-2500
UNITED STATES DEPARTMENT OF JUSTICE, Judge Kessler	)
Defendant.	)

DECLARATION OF
JAMES S. REYNOLDS

I, James S. Reynolds, declare as follows:

1. I am the Chief of the Terrorism and Violent Crime Section in the Criminal Division of the U.S. Department of Justice ("DOJ") and have served in this capacity since May, 1991. As part of my official duties, I am one of those responsible for coordinating and supervising DOJ's investigation into the September 11, 2001, attacks of the World Trade Center and Pentagon ("PENTTBOM"), and its investigation of related threats, conspiracies, and attempted terrorist attacks throughout the nation and the world. This declaration is

based upon my personal knowledge and upon information provided to me in my official capacity.

2. Following the events of September 11,2001, the United States government launched an extensive, broad based and world-wide investigation into those terrorist attacks and into threats, conspiracies, and attempts to perpetrate terrorist acts against United States citizens and interests. Since September 11, DOJ has actively been conducting the investigation in conjunction with other federal, state and local agencies. Four thousand FBI agents are engaged with their international counterparts in an unprecedented worldwide effort to prevent further attacks by apprehending those responsible for the September 11 attacks and by detecting, disrupting, and dismantling terrorist organizations. This is an open and ongoing investigation; the FBI is continuing to follow leads and conduct interviews at this time.

3. As part of this investigation, law enforcement has questioned over one thousand individuals about whom concern had arisen.

4. The concerns related to some of these individuals were resolved by the interviews and no further action was taken related to them. Other interviews resulted in a decision to take individuals into custody. Those detainees fall into three general categories. First, some were arrested for alleged violations of federal criminal law. Second, those who have violated immigration laws have been detained by INS for immigration violations. Third, some individuals who were believed to have information material to the events of September 11 were taken into custody under material witness warrants pursuant to 18

U.S.C. § 3144.

5. Plaintiffs seek information about all of these individuals. The information they seek is contained in DOJ records created as a result of these investigations. DOJ and its components, including INS and FBI, have opened and maintained these files. These files pertain to the ongoing immigration proceedings of the detainees and related investigations.

6. Specifically, plaintiffs' FOIA requests seek the following four items of information regarding individuals "arrested or detained" in the wake of the September 11 attacks on the World Trade Center and Pentagon:

   a. (l) their names and citizenship status; (2) the location where each individual was arrested or detained initially and the location where they are currently held; (3) the dates they were detained or arrested, the dates any charges were filed, and the dates they were released, if they have been released; and (4) the nature of any criminal or immigration charges filed against them or other basis for detaining them, including material witnesses warrants and the disposition of such charges or warrants.

   b. The identity of any lawyers representing any of these individuals, including their names and addresses.

   c. The identities of any courts, which have been requested to enter order sealing any proceedings in connection with any of these individuals, any such orders which have been entered, and the legal authorities that the government has relied upon in seeking any such secrecy orders.

d. All policy directives or guidance issued to officials about making public statements or disclosures about these individuals or about the sealing of judicial or immigration proceedings.

7. The Department of Justice has already released publicly a significant amount of information sought by plaintiffs, varying according to the category of the detainee. First, for INS detainees, DOJ has already disclosed to plaintiffs (1) their place of birth, (2) citizenship status, (3) the immigration charges brought against them, and (4) the date charges were filed. With respect to citizenship status, none of the INS detainees is a United States citizen; each is in removal proceedings, subject to administrative removal, or subject to a final order of removal. All of this information was broadly disseminated to the general public prior to the filing of this lawsuit. The released information is attached hereto.

8. Second, for those persons being held on federal criminal charges whose cases are not under seal, DOJ has already disclosed to plaintiffs (1) their names, (2) the dates any charges were filed, (3) the date the defendant was released, if released, (4) the nature of the criminal charges filed against them, and (5) their lawyer's identity. Prior to the filing of this lawsuit, DOJ also released to the public the district where the complaint or indictment was filed, whether the defendant was the subject of a complaint or an indictment, and the Assistant United States Attorney assigned to the prosecution. The information is attached hereto.

9. Nevertheless, as set forth below in more detail, DOJ has withheld certain information on the three categories of

detainees identified in paragraph 4. The scope of the withheld information has been narrowly tailored to protect the integrity and efficacy of the ongoing investigations, to ensure the safety of the detainees and U.S. citizens, and to prevent the invasion of the personal privacy of the detainees and other individuals associated with them. DOJ has withheld certain information sought with respect to each of the three categories of detainees as follows:

INS DETAINEES

10. The first category of detainees are persons being held on immigration-related charges by INS. These individuals were originally questioned because there were indications that they might have connections with, or possess information pertaining to, terrorist activity against the United States including particularly the September 11 attacks and/or the individuals and organizations who perpetrated them. For example, they may have been questioned because they were identified as having interacted with the hijackers, or were believed to have information relating to other aspects of the investigation. In the course of questioning them, law enforcement agents determined, often from the subjects themselves, that they were in violation of federal immigration laws, and, in some instances also determined that they had links to other facets of the investigation.

11. Regarding the INS detainees, DOJ has withheld the following information: (1) the names of the INS detainees, (2) their citizenship status, (3) the location where they were initially arrested or detained, (4) the location where they are currently being held, (5) the date of their arrest or detention, and (6) their lawyer's identity.

12. Information regarding the INS detainees is being withheld pursuant to Exemption 7 (A), 7(C) and 7(F) of FOIA, 5 U.S.C. § 552(b)(7). Exemption 7(A) protects from disclosure "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). Exemption 7(C) protects law enforcement information the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." Id. § 552(b)(7)(C). Exemption 7(F) protects information compiled for law enforcement purposes, the disclosure of which could reasonably be expected to endanger the life or physical safety or an individual. Id. § 552(b)(7)(F).

Exemption 7(A) of FOIA

13. As discussed below, as long as these investigations remain open and active, disclosing the information in question could result in significant harm to the interests of the United States and compromise the September 11 and other ongoing terrorism- related investigations. Indeed, releasing this information could pave the way for additional terrorist activities in that it would undermine the ability of the United States to obtain cooperation from knowledgeable witnesses, thereby hampering follow up on investigative leads.

14. First, disclosing the names of the detainees who may be revealed to have knowledge of or a connection to terrorism could lead to the public identification of individuals associated with them, other investigative sources, and potential witnesses. Terrorist organizations that discover the identities of these individuals could subject them to

intimidation or harm, thereby discouraging or preventing them from supplying valuable information or further leads.

15. Second, divulging the detainees' identities may deter them from cooperating with the Department of Justice once they are released from custody and impair their usefulness to the ongoing investigation. As a result of their public identification, terrorist organizations with whom they have a connection may refuse to deal further with them. This could eliminate valuable sources of information for the investigation. It would similarly impair the government's ability to infiltrate terrorist organizations engaged in ongoing criminal activities. Moreover, a detainee who knows his name will be made public may be deterred from cooperating now or in the future for fear of retaliation by terrorist organizations against him or his family and associates.

16. Third, releasing the names of the detainees who may be associated with terrorism and their place and date of arrest would reveal the direction and progress of the investigations by identifying where DOJ is focusing its efforts. In effect, it would allow terrorist organizations to map the progress of the investigation and thereby develop the means to impede them. Even disclosing the identities of those detainees who have been released may reveal details about the focus and scope of the investigation and thereby allow terrorists to counteract it. This may cause terrorists, who learn that their associates or even people who know their associates have been detained, to alter their plans in a way that presents an even greater threat to the United States. Official verification that a member has been detained and therefore can no longer carry out the plans of his terrorist organization may enable the

organization to find a substitute who can achieve its goals more effectively, thereby thwarting the government's ability to frustrate ongoing conspiracies. For example, upon learning that a particular terrorist cell has been compromised through the detention of some or all of its members or affiliated persons, terrorists may switch to an alternative cell, thereby retaining the ability to mount future terrorist attacks.

17. Fourth, the public release of names, and place and date of arrest, of detainees who may have knowledge of or connections to terrorism, could allow terrorist organizations and others to interfere with the pending proceedings by creating false or misleading evidence. As a consequence, the investigations will be hindered by unnecessary and burdensome confusion. Similarly, revealing the location of the detainees may facilitate contact between detainees mad members of terrorist organizations.

18. The rationale that underlies the withholding of the names of the detainees similarly supports the nondisclosure of their lawyers' identities under 5 U.S.C. § 552(b)(7)(A) and (F). Although some attorneys may voluntarily reveal the names of their clients, such sporadic, piecemeal disclosures are qualitatively different from DOJ's publication of a comprehensive list of all lawyers' names. Release of such a list may facilitate the identification of the detainees themselves and the harms described above could ensue.

Exemption 7(C) of FOIA

19. The detainees have a substantial privacy interest in their

names and the requested personal information connected with their status as detainees. All of these individuals were originally detained because of their possible connection to terrorism, particularly to the worst terrorist attack ever committed on United States soil. Although they may eventually be found to have no connection to terrorist activity, release of their names and personal information at this time would forever connect them to the September 11 attacks. Given the nature of these investigations, the mere mention of their name in connection with these investigations would cause the detainees embarrassment, humiliation, risk of retaliation, harassment and possibly even physical harm in the United States and in their home countries, if they are eventually deported. They could be stigmatized by being viewed as "guilty by association." The viciousness of the attacks of September 11 is unprecedented. The interests of these detainees in not being connected with such activity is overwhelming.

20. In their requests plaintiffs state that "there is an overriding public interest in knowing the activities of the government in detaining people in connection with the September 11 attack." This assertion of generalized public interest is not linked to the specific information that has been requested. The Department of Justice has already released much information about "the activities of the government in detaining people," such as the number of people detained and the charges brought against them. The disclosure of their names and their current location * which could lead to their identification * would pose the risks discussed in paragraphs 14-17 while not adding significantly to the public's understanding of the overall activities of the government. As a result, when the strong privacy interests of the detainees are balanced against any public interest in

disclosure, the privacy interests in protection outweigh any perceived public interest in release.

21. Moreover, all of these individuals have been charged with immigration violations which are at various stages of the administrative process. Many detainees have retained counsel and all detainees have that right. No one has been denied their right to talk to an attorney. INS has provided each of the persons detained on immigration violations with information about available pro bono representation. Persons with criminal charges filed against them and material witnesses have been assigned counsel at government expense if they cannot afford one.

22. While these proceedings are usually public, see 8 C.F.R. § 240.10(b) (with various exceptions, see 8 C.F.R. § 3.27), the Department of Justice has ordered them sealed if they involve a detainee originally taken into custody in connection with the terrorist investigation. Identifying information has been kept confidential to avoid stigmatizing the detainee through the implication that he is associated with terrorism.

23. If the detainees wish to disclose their names they may do so. For the Department of Justice to publish a list of potential or actual immigration violators, however, would violate their personal privacy interests, which are protected by 5 U.S.C. § 552(b)(7)(C). Release of this information would not contribute meaningfully to the public's understanding of the inner workings of the government.

Lawyers of the Detainees

24. The names of the detainees' lawyers are also being

withheld pursuant to FOIA Exemption 7(C). In reaching our determination to withhold this information, we balanced the privacy interests of these individuals against any public interest in disclosure. While there may be some other public interest * not applicable under the FOIA * in ensuring that the detainees are properly represented, that interest is not vindicated here. In fact, we can discern no public interest cognizable under the FOIA in the identities of the individual private attorneys that have been retained.

25. Any public interest that may exist is far outweighed by the strong privacy interests at stake here. Unlike more routine immigration cases where attorneys readily, and openly represent clients, these particular lawyers are representing individuals who have been apprehended in connection with the investigation emanating from what has been described as an act of war against the United States. The overwhelming grief and anger felt by the American people could be directed at these attorneys even more strongly than at the detainees themselves. While all people have a right to counsel in this country, some individuals may view the attorneys' representation of the detainees negatively because of the severity of the attacks on our nation.

26. Indeed, some attorneys may have been dissuaded from representing individuals in this context. Those that do, run the risk that they will be subjected to harassment or retaliation in their personal as well as professional lives. Revealing the identities of these lawyers may also subject them to unwanted scrutiny by the public or the media that could distract them from effective representation of their clients. They have a strong privacy interest in not having the government facilitate such harms by publicly identifying them to all the world. Those attorneys who

wish to come forward and identify themselves voluntarily are free to do so, but the government should not be forced to reveal a comprehensive list of all their identities thereby forcibly exposing those that chose to remain obscure to the risks described above.

DETAINEES CHARGED WITH FEDERAL CRIMES

27. The second category of detainees consists of 117 individuals who have been held on federal criminal charges. One individual, Zaccharias Moussaui, has been charged with violations of federal criminal laws in connection with the September 11 attacks. Like the INS detainees, these individuals were originally apprehended by federal, state, or local law enforcement as a result of the federal investigation emanating from the September 11 attacks. These individuals face federal criminal charges. They remain a potential source of relevant or probative information.

28. The following information has not been disclosed: (1) their citizenship status, (2) the location where they were initially arrested or detained, (3) the location where they are currently being held, and (4) the date of their arrest or detention. This information was withheld pursuant to 5 U.S.C. § 552(b)(7)(A), 7(C) and 7(D). The release of this information would assist terrorist organizations in tracking the flow and progress of the investigation and to develop a strategy to counteract it, as described above. Accordingly, it was properly withheld to prevent the possible compromise of this most sensitive investigation.

29. Information pertaining to the detainees charged with federal crimes is also exempt from release under

Exemption 7(C). Because of these individuals' association with the terrorist investigation, disclosing their detention location could subject them to possible harassment, intimidation and even physical harm. It is not unusual for other prisoners in a facility to attempt to harm or harass those they believe have been involved in particularly heinous crimes. If prisoners learn that an individual who was detained as a result of the investigation emanating from the September 11 attacks is in their own prison facility, some may try to retaliate against this individual.

30. In addition, the detention location is an item of information about each of these individuals. The detainees have no voice in the determination as to where they are detained.

MATERIAL WITNESSES

31. The third category of detainees consists of persons who have been the subject of a material witness warrant issued by a federal court. Plaintiffs have requested the names of these detainees, their citizenship status, the location where they were arrested or detained, the location where they are being held, the dates they were arrested or detained, the date any charges were filed, the date they were released, if released, the nature of any charges against them, and their lawyers' names. All information sought in the FOIA request regarding these detainees has been withheld.

32. The United States District Courts before which the material witnesses have appeared have issued sealing orders prohibiting the government from releasing any information about these proceedings. Hence, this information is not under the control of the Department of Justice, which therefore cannot release it to plaintiffs.

33. Moreover, this information is also protected from disclosure by Exemption 3 of the FOIA, 5 U.S.C. § 552 (b)(3). This exemption protects information exempted from disclosure by statute. In this case, information pertaining to material witnesses was withheld pursuant to Federal Rule of Criminal Procedure 6(e).

34. Rule 6(e) prohibits the disclosure of information that would reveal the inner workings of the grand jury. This prohibition includes the identities of witnesses and the substance of testimony, as well as information that would reveal the scope, focus and direction of the grand jury proceedings. To reveal any information pertaining to the material witnesses, including their identities and any information which would lead to their identities, would violate Rule 6(e) by revealing witness names as well as the scope and direction of the grand jury proceedings.

35. Disclosure of this information about material witnesses could also reveal the strategy or direction of the investigation as described above. These justifications are particularly compelling for the material witnesses, as they are believed to have evidence directly relevant to acts of terrorism. Therefore the information is also being withheld pursuant to 5 U.S.C. § 552(b)(7)(A).

36. Those individuals who are being held on material witness warrants also have a substantial privacy interest in their names and the requested personal information connected with their status as a material witness. As with the INS detainees, these individuals were apprehended as a result of the terrorist investigation and they have a strong interest in not being identified with the investigation. Even more significantly, these material witnesses would be assumed

by many people to have significant information relevant to the events of September 11. In fact, it may turn out that these individuals have no information useful to the investigation or that they are innocent people who are able to assist the government in its investigations. To reveal their identities in connection with these investigations could stigmatize them and subject them to harassment and possibly even retaliation. We can discern no public interest that outweighs their strong privacy interests.

Exemption 7(F) of the FOIA

37. FOIA Exemption 7(F), 5 U.S.C. 552 § (b)(7)(F) also protects the identities of the INS detainees, the identities of those being held on material witness warrants, the detention location of those who have been charged with a federal crime, and the identities of the detainees' lawyers. Exemption 7(F) protects information the disclosure of which "could reasonably be expected to endanger the life or physical safety of any individual." As discussed above, all of the detainees were apprehended in connection with the investigation emanating from the September 11 attacks. Revealing their identities could subject them to physical danger both in the United States and in their home countries if they are deported. Detainees who are, in fact affiliated with a terrorist group may be perceived by such groups as informants for the United States and be killed to preclude their future cooperation. In addition, the detainees' family members and friends could face threats of physical violence by terrorists to deter the detainees from cooperating. Moreover, revealing the detention facilities where these individuals are being detained could place at risk not only those detainees, but the facilities themselves and their employees.

38. For these same reasons, attorneys who are representing the detainees could also face physical harm if their identities are revealed. Some might construe the attorneys as working against the interests of the United States and seek to retaliate against them. Also, members of terrorist organizations may fear that detainees are supplying their attorneys with too much information and, lacking the ability to get at the detainees while they are imprisoned, may instead choose to harm their attorneys. In light of the brutality of the acts committed against the United States, even the mere possibility of retaliation against these lawyers justifies withholding their identities.

PLAINTIFFS' FOIA REQUEST NO. 3 (COMPLAINT ¶ 29(c)

39. DOJ has denied plaintiffs' request for the identity of any courts which have been requested to enter orders sealing any proceedings in connection with individuals arrested or detained in the wake of the September 11 attack, any such orders which have been entered, and the legal authorities that the government has relied upon in seeking any such secrecy orders. Nationwide, there are ten orders responsive to plaintiffs' request. However, neither the orders nor any of the other information requested is under DOJ's control. Rather, the orders have been sealed by the relevant United States District Courts and prohibit the government from releasing any information. Thus, the Department of Justice cannot properly provide the information plaintiffs request.

40. Even if the information could be disclosed, it is exempt from disclosure pursuant to 5 U.S.C. § 552(b)(7) (A). Publicizing this information would reveal investigative strategy or an unusual level of law enforcement interest in a detainee which would impair investigative efforts, as

further described herein.

41. As has been described above, the Department of Justice has made every effort to segregate and release all non-exempt information requested by plaintiffs. Toward that end, defendant has released entire categories of information. The information defendant continues to withhold cannot be disclosed without causing or risking the serious and substantial harms outlined herein.

I declare under penalty of perjury that the foregoing is true and correct.

1/11/2002
DATE

/s/ James S. Reynolds
JAMES S. REYNOLDS

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR NATIONAL SECURITY STUDIES, ET AL.	)	
Plaintiffs,	)	
v.	)	Civil Action No. 01-2500
UNITED STATES DEPARTMENT OF JUSTICE, Judge Kessler	)	
Defendant.	)	

SUPPLEMENTAL DECLARATION OF
JAMES S. REYNOLDS

I, James S. Reynolds, declare as follows:

1. This Declaration supplements and is a continuation of my previous Declaration dated January 11, 2002. I have read Plaintiffs' Motion to Stay Proceedings on Defendant's Summary Judgment Motion Pending Discovery.

2. Since September 11, 2001, many individuals were questioned by federal, state, and local law enforcement agencies about the terrorist attacks but not formally taken into custody. While DOJ attempted at one time to keep

and publicly release a count of all persons contacted by law enforcement in connection with the attacks, even if they were just brief, stopped, it became clear that this was impractical. Eventually, DOJ concluded that it was better to focus on the individuals who were formally taken into custody because they were believed to have violated federal criminal law or the immigration laws, or were believed to have information material to grand jury investigations emanating from the events of September 11.

3. The total number of individuals detained pursuant to the investigation is fluid. On any given day since September 11 the FBI has followed leads which may have resulted in the apprehension of additional individuals suspected of connections to terrorism. By the same token, persons believed not to be of current interest regarding the investigations emanating from the September 11th attacks are placed in an "inactive" status and may have been released from custody or deported. For these reasons, and because public officials have used different sets of numbers and different definitions of the term "detainee" over time, comparisons of public statements by various officials about the total number of detainees is bound to produce different, and imprecise, numbers.

4. As with the INS detainees, the total number of persons charged with federal crimes in the aftermath of the September 11th attacks will change over time, sometimes from day to day, so that comparisons of public statements on the total number of charged defendants will vary as well.

5. Because the investigation is active and ongoing, disclosing the identities of detainees who have been placed in

inactive status, whether released from custody or not, could still harm the investigation. Even though such detainees may not themselves be of current investigative interest, the same harms described in my prior declaration at paragraphs 14-16 could occur if their names are disclosed.

6. Specifically, disclosure could inform terrorist organizations about what evidence law enforcement has obtained, or, just as importantly, has not obtained. Disclosure could reveal investigative methods, sources, and witnesses. The individuals involved could be subjected to intimidation or harm, thereby discouraging or preventing them from supplying valuable information or leads in the future. Disclosure could deter these individuals from cooperating with the Department of Justice after they are released from custody for fear of retaliation by terrorist organizations against them or their family members and associates. Disclosure could reveal important information about the direction, progress, focus and scope of the investigation, and thereby assist terrorist organizations in counteracting our investigative efforts. For example, disclosing information about persons who are not currently the subject of investigative interest may inform terrorist organizations of routes of investigation that were followed but eventually abandoned. Such information could provide insights into the past and current strategies and tactics of law enforcement agencies conducting the investigation.

7. Moreover, because the investigation is fluid and evolving, the significance of a given detainee may change over time. For example, a particular detainee who had been determined to be of no investigative interest in November 2001 was returned to the active interest category later that

month after a reevaluation by law enforcement components involved in the investigation.

8. Exhibit 5 of the Government's motion for summary judgment is a list of persons charged with federal crimes in the aftermath of the September 11th attacks. The names of sixteen individuals were inadvertently omitted from that list. The Government is submitting with its response to plaintiffs motion to stay proceedings an amended Exhibit 5 which contains the pertinent information about those individuals.

9. Paragraph 39 of my prior declaration states that there are ten orders by courts "sealing proceedings in connection with individuals arrested or detained in the wake of the September 11 attack. . . ." Although the intended meaning should be apparent upon close scrutiny, I want to make explicit that paragraph 39 refers to cases in which a defendant had been charged with a federal crime, and not to cases in which an individual had been taken into custody under a material witness warrant. Also, the total number of sealed criminal cases on January 11, 2002 was nine, rather than ten. The tenth defendant's case was originally sealed, but was unsealed on or before January 11th. The identity and other pertinent information about this defendant was included in Exhibit 5 of the Government's motion for summary judgment. As with the number of persons charged with federal crimes and the number of INS detainees, the number of criminal cases under seal changes from time to time as the courts enter unsealing orders, and as new cases are charged which are placed under seal by the courts after a request from the prosecutors.

I declare under penalty of perjury that the foregoing is true and correct.

2/4/2002	/s/ James S. Reynolds
DATE	JAMES S. REYNOLDS

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DETROIT FREE PRESS et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 02-70339
DEPARTMENT OF JUSTICE,	)	Honorable Nancy G. Edmunds
Defendant.	)	

DECLARATION OF DALE L. WATSON

I, Dale L. Watson, declare as follows:

1. I am the Executive Assistant Director for Counterterrorism and Counterintelligence of the Federal Bureau of Investigation. As part of my official duties, I am one of those responsible for coordinating and supervising DOJ's investigation into the September 11, 2001, attacks on the World Trade Center and Pentagon, and its investigation of related threats, conspiracies, and attempted terrorist attacks throughout the nation and the world. This declaration is based upon my personal knowledge and upon information provided to me in my official capacity.

BACKGROUND ON BREADTH
OR GOVERNMENT INVESTIGATION

2. Following the events of September 11, 2001, the United States government launched an extensive, broad-based and worldwide investigation into those terrorist attacks and into threats, conspiracies, and attempts to perpetrate terrorist acts against United States citizens and interests. Since September 11, DOJ has actively been conducting the investigation in conjunction with other federal, state and local agencies. Thousands of FBI agents have been engaged with their federal, state, local and international counterparts in an unprecedented worldwide effort to prevent further attacks by apprehending those responsible for the September 11 attacks and by detecting, disrupting, and dismantling terrorist organizations.

3. This is an open and ongoing investigation; the FBI is continuing to follow leads and conduct interviews at this time.

4. As a result of the investigation, there is a pending prosecution in the Eastern District of Virginia entitled *United States v. Moussaoui* directly related to the September 11, 2001 attacks. In addition, there is a pending terrorist prosecution entitled *United States v. John Walker Lindh* in the Eastern District of Virginia directly related to the terrorist groups involved in orchestrating the September 11, 2001 attacks as well as the United States' efforts in the war on terrorism.

5. The United States continues to investigate these terrorist groups as well as the attacks and other planned and/or

potential attacks on the United States or United States interests abroad. For example, there is a pending prosecution in the District of Massachusetts entitled *United States v. Richard Reid* relating to a thwarted terrorist attempt to bomb an aircraft by an individual who is alleged to have trained in an Al Qaeda terrorist camp.

6. As part of this investigation, law enforcement has questioned thousands of individuals. Some interviews resulted in a decision to take individuals into custody. Those detainees fall into three general categories. First, some were arrested for alleged violations of federal criminal law. Second, those who have violated immigration laws have been detained by INS for immigration violations (and are hereafter referred to as the "INS detainees"). Third, some individuals who were believed to have information material to the events of September 11 were taken into custody under material witness warrants pursuant to 18 U.S.C. § 3144.

7. Proceedings involving material witnesses being held pursuant to 18 U.S.C. § 3144 have been conducted under seal pursuant to federal court orders.

BACKGROUND ON INS DETAINEES' LINKS TO ONGOING INVESTIGATIONS

8. Although the INS detainees are being held by INS on immigration-related charges, they were originally questioned because there were indications that they might have connections with, or possess information pertaining to, terrorist activity against the United States including particularly the September 11 attacks and/or the individuals and organizations who perpetrated them. For

example, they may have been questioned because they were identified as having interacted with the hijackers, or were believed to have information relating to other aspects of the investigation. Other INS detainees may have been questioned because of their association with an organization believed to be involved in providing material support to terrorist organizations operating domestically or abroad. In the course of questioning them, law enforcement agents determined, often from the subjects themselves, that they were in violation of federal immigration laws, and, in some instances, also determined that they had links to other facets of the investigation.

9. On September 21, 2001, ten days after the terrorist attacks on the World Trade Center and the Pentagon, Chief Immigration Judge Michael J. Creppy issued a directive closing the immigration cases relating to certain of these INS detainees. The cases encompassed by the directive have come to be referred to as "special interest" cases. Such cases are closed to the public and docket information concerning them is not publicly available. Further, immigration courtroom personnel and contract interpreters are precluded from discussing the case.

10. As relates to those INS detainees for whom investigative concerns remained at the time they were taken into custody, efforts have continued to resolve those concerns, and in many instances the concerns have been resolved. It is only those INS detainees about whom concerns remain who are included in the "special interest" category and for whose cases the Creppy directive is applied. There are a relatively limited number of INS detainees in the special interest category.

OPENING SPECIAL INTEREST INS DETENTION HEARINGS WOULD PUBLICLY REVEAL THE COURSE OF THE UNITED STATES' INVESTIGATION

11. As discussed below, opening "special interest cases" immigration hearings to the public could result in significant harm to the interests of the United States and could compromise the September 11 and other ongoing terrorism-related investigations.

12. Public hearings will reveal sources and methods of investigation. This will include information which, when assimilated with other information the United States may or may not have in hand, allows a terrorist organization to build a picture of the investigation. Terrorist organizations that have the sophistication necessary to engage in multiple, simultaneous attacks are involved in gathering intelligence concerning the activities of the U.S. Government and its law enforcement agencies. Bits and pieces of information that may appear innocuous in isolation can be fit into a bigger picture by terrorist groups in order to thwart the Government's efforts to investigate and prevent terrorism. For example:

    - Information about what evidence led to the detention of each individual may not, taken alone, appear significant. However, information about numerous detainees and why they were originally detained would allow the terrorist organization to discern patterns and methods of investigation.

    - Information about how any given individual entered the country (from where, when, and how) may not divulge significant information that would

reveal sources and methods of investigation. However, putting entry information into the public realm regarding all "special interest cases" would allow the terrorist organization to see patterns of entry, what works and hat doesn't. It may allow them to have the information they need to alter methods of entry into the United States for terrorist members.

- Information about what evidence the United States has against members of a particular cell collectively will inform the terrorist organization as to what cells to use and which not to use for further plots and attacks.

13. Further, selective disclosure of evidence about particular detainees, even evidence that does not tie directly to terrorism, would be harmful because it reveals what information the United States *may not* possess about a particular detainee. For example, the United States may disclose in a public hearing certain evidence it possesses about a member of a terrorist organization. It may be that the detainee is actually involved in a planned attack. Opening the hearing may allow the terrorist organization to know (or believe) that the United States is not yet aware of the attack based on what is presented at the open hearing.

14. A detainee with a minor or supporting role in a terrorist cell may not realize the import of the information revealed in his hearing, whereas the leader of that operation, learning that information from a media or other report of the hearing, may recognize and act on its significance.

15. Opening immigration hearings for the "special interest cases" would outline the direction and progress of the investigations by identifying where DOJ is and has been focusing its efforts. In effect, it could allow terrorist organizations to map the progress of the investigation and thereby develop the means to impede it. For example, this may cause terrorists, who learn that their associates or even people who know their associates have been detained to alter their plans in a way that presents an even greater threat to the United States. For example,

    - Discovering that a particular detainee is detained, or discovering that particular information about a plot is public, may cause the terrorist group to accelerate the timing of a planned attack, reducing the time available to detect and prevent such an attack.

    - Official verification that a member has been detained and therefore can no longer carry out the plans of his terrorist organization may enable the organization to find a substitute who can achieve its goals more effectively, thereby thwarting the government's ability to frustrate ongoing conspiracies.

    - Upon learning that a particular terrorist cell has been compromised through the detention of some or all of its members or affiliated persons, or disclosure of evidence about that particular cell, terrorists may switch to an alternative cell, thereby retaining the ability to mount future terrorist attacks.

- Public disclosure at a hearing that a detainee or other witness may be cooperating would alert the terrorist organization to this and potentially cause the organization to take some action to thwart the investigative efforts and/or jeopardize the witness.

16. Public hearings involving evidence about terrorist links (or detainees where we are not even sure yet the extent of any terrorist links) could allow terrorist organizations and others to interfere with the pending proceedings by creating false or misleading evidence. Even more likely, the terrorist organizations may destroy or conceal evidence, tamper with or threaten potential witnesses, or otherwise obstruct the ongoing investigations and pending prosecutions. For example, if evidence is disclosed that a particular detainee has funded a terrorist organization through a particular method or scheme and the United States is now aware of that scheme, other individuals may destroy evidence of funding that organization through similar schemes. Or, the organization itself may be tipped off to the United States investigative methods in a way that causes it to move the underlying funds.

17. Opening immigration hearings for the "special interest cases" would reveal other investigative sources and potential witnesses for other pending cases. For example, if evidence is offered about a particular phone number link between a detainee and a number connected to a terrorist organization or member, other individuals who have used that number in the past will be on notice that the United States is now aware of the links. It may even be able to determine what sources and methods the United States used to become aware of that link.

18. Likewise, divulging the detainees' identities and opening their hearings may deter them or others from cooperating with the Department of Justice once they are released from custody and impair their usefulness to the ongoing investigation. As a result of their public identification, terrorist organizations with whom they have a connection may refuse to deal further with them. This could eliminate valuable sources of information from the investigation. It would similarly impair the government's ability to infiltrate terrorist organizations engaged in ongoing criminal activities. Moreover, a detainee who knows his name will be made public may be deterred from cooperating now or in the future for fear of retaliation by terrorist organizations against him or his family and associates. Terrorist organizations that discover the identities of these individuals could subject them to intimidation or harm, thereby discouraging or preventing them from supplying valuable information or further leads.

19. Of course, in addition to the potential for significant harm to U.S. interests, posed by open hearings, INS detainees also have a substantial privacy interest in having their possible connection to the ongoing investigation kept undisclosed. Although some particular detainees may choose to identify themselves, it is important to note that as to all INS detainees whose cases have been placed in the special interest category concerns remain about their possible connection to terrorism, and specifically to the worst terrorist attack ever committed on United States soil. Although they may eventually be found to have no connection to terrorist activity, discussion of the causes of their apprehension in open court would forever connect them to the September 11 attacks. Given the nature of these investigations, the mere mention of their names in

connection with these investigations could cause the detainees embarrassment and humiliation.

20. Further, the government cannot proceed to close hearings on a case-by-case basis, as the identification of certain cases for closure, and the introduction of evidence to support that closure, could itself expose critical information about which activities and patterns of behavior merit such closure.

21. Since September 11 the United States has been involved in an unprecedented worldwide effort to prevent further attacks by apprehending those responsible for the September 11 attacks and by detecting, disrupting, and dismantling terrorist organizations. In the course of this effort, DOJ has made extensive use of grand juries in conducting the investigation.

22. Due to the breadth of DOJ use of grand juries in the wake of the September 11 attacks, it is entirely foreseeable that grand jury information will be pertinent to immigration hearings of special interest INS detainees. This is true notwithstanding the fact that the deportation charge against a particular alien may not relate to terrorism, as grand jury information may be directly relevant to such issues as the granting of bail or relief from deportation. Although Rule 6(e)(3)(C)(i)(I) authorizes DOJ to obtain a court order to disclose such information in the immigration proceeding, the general secrecy consideration which underlies grand juries strongly counsels against disclosure of such information if the immigration proceeding is open to the public. As a result, the Government may be placed in a position of not being able to advance directly probative information in the course of the immigration proceeding.

23. Evidence introduced in the immigration proceeding might reveal the fact or nature of an ongoing criminal investigation (whether or not a grand jury is being used) and provide the terrorist organization information about the nature and direction of the United States investigative and prosecution efforts.

I declare under penalty of perjury that the foregoing is true and correct.

4/9/2002	/s/ Dale L. Watson
DATE	DALE L. WATSON

Supreme Court, U.S.
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No. 03-472

In the Supreme Court of the United States

CENTER FOR NATIONAL SECURITY STUDIES, ET AL.,
PETITIONERS

v.

UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Department of Justice properly withheld under the Freedom of Information Act, 5 U.S.C. 552, the identities and related information of individuals interviewed and subsequently detained in an ongoing law enforcement investigation.

2. Whether the First Amendment creates a right of access to governmental records identifying individuals who have been questioned and detained as part of an ongoing law enforcement investigation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
1. The court of appeals applied settled principles of law under FOIA Exemption 7(A)	10
2. The court of appeals correctly upheld withholding of the particular records at issue	15
3. Petitioners' First Amendment claim does not merit review	21
Conclusion	23

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Cases:

Alyeska Pipeline Serv. Co. v. *EPA*, 856 F.2d 309 (D.C. Cir. 1988)	14
Burge v. *Eastburn*, 934 F.2d 577 (5th Cir. 1991)	20
CIA v. *Sims*, 471 U.S. 159 (1985)	2, 17, 21
Chicago & S. Air Lines, Inc. v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948)	17
Crooker v. *Bureau of Alcohol, Tobacco & Firearms*, 789 F.2d 64 (D.C. Cir. 1986)	14-5
Curran v. *Department of Justice*, 813 F.2d 473 (1st Cir. 1987)	14
Department of Justice v. *Julian*, 486 U.S. 1 (1988)	2
Department of Justice v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)	14
Detroit Free Press v. *Ashcroft*, 303 F.3d 681 (6th Cir. 2002)	22
Fitzgibbon v. *CIA*, 911 F.2d 755 (D.C. Cir. 1990)	20
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John Doe Agency v. *John Doe Corp.*, 493 U.S. 146 (1989) 2
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Neely v. *FBI*, 208 F.3d 461 (4th Cir. 2000) 20
North Jersey Media Group v. *Ashcroft*, 123 S. Ct. 215 (2003) 22
Press-Enterprise Co. v. *Superior Court*, 478 U.S. 1 (1986) 22
Richmond Newspapers, Inc. v. *Virginia*, 448 U.S. 555 (1980) 22
Weinberger v. *Catholic Action*, 454 U.S. 139 (1981) 2
Zadvydas v. *Davis*, 533 U.S. 678 (2001) 9, 17

Constitution, statutes and rule:

U.S. Const. Amend. I 8, 10, 21, 22
Act of July 30, 1997, Pub. L. No. 95-78, § 2(a), 91 Stat. 319 6
Authorization for Use of Military Force, Pub. L. No. 107-40, preamble, 115 Stat. 224 3
Freedom of Information Act:
5 U.S.C. 552 2
5 U.S.C. 552(b)(1) 8, 16
5 U.S.C. 552(b)(3) 6, 8, 16
5 U.S.C. 552(b)(7) 5, 7
5 U.S.C. 552(b)(7)(A) ..... *passim*

Statutes and rule—Continued: Page

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5 U.S.C. 552(b)(7)(F) 5, 8, 15, 19, 20
Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat. 3207-48 13
18 U.S.C. 3144 4
Fed. R. Crim. P. 6(e) 6

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S. Rep. No. 221, 98th Cong., 1st Ssess. (1983) 14

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-63a) is reported at 331 F.3d 918. The opinion of the district court (Pet. App. 64a-101a) is reported at 215 F. Supp. 2d 94.

JURISDICTION

The court of appeals entered its judgment on June 17, 2003. On September 9, 2003, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including September 29, 2003, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. Through the Freedom of Information Act (FOIA), 5 U.S.C. 552, Congress attempted "to balance the public's need for access to official information with the Government's need for confidentiality." *Weinberger* v. *Catholic Action*, 454 U.S. 139, 144 (1981). While FOIA generally calls for "broad disclosure of Government records," Congress also "realized that legitimate governmental and private interests could be harmed by release of certain types of information." *Department of Justice* v. *Julian*, 486 U.S. 1, 8 (1988) (quotation marks omitted). Because "public disclosure is not always in the public interest," Congress "provided that agency records may be withheld" if they fall within one of the Act's nine exemptions. *CIA* v. *Sims*, 471 U.S. 159, 166-167 (1985). Those exemptions "are intended to have meaningful reach and application." *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989).

One such exemption is Exemption 7(A), which permits the withholding of "records or information compiled for law enforcement purposes" if their "production * * * could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A). Unlike other FOIA exemptions, Exemption 7(A) may be invoked without detailed identification or analysis of the individual documents. Rather, it is a categorical exemption that broadly protects types and classes of documents from disclosure if the government demonstrates that their production could reasonably be expected to hamper civil or criminal enforcement proceedings. See *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 224, 236 (1978).

2. On September 11, 2001, the al Qaeda terrorist network attacked the United States, murdering thou-

sands of innocent civilians. In response, Congress affirmed the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Authorization for Use of Military Force, Pub. L. No. 107-40, preamble, 115 Stat. 224. Congress also specifically found that terrorists "continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States." *Ibid.*

The President promptly ordered "an extensive, broad based and world-wide investigation into those terrorist attacks and into threats, conspiracies, and attempts to perpetrate terrorist acts against United States citizens and interests," which included "an unprecedented worldwide effort to prevent further attacks by apprehending those responsible for the September 11 attacks and by detecting, disrupting, and dismantling terrorist organizations." Pet. App. 107a (Declaration of James S. Reynolds). The terrorism investigation is "open and ongoing." *Ibid.* The FBI and other law enforcement agencies are continuing to follow leads and conduct interviews at this time. *Ibid.*; see *id.* at 2a.

In the course of that investigation, the government interviewed and subsequently detained numerous individuals. Those individuals fall into three categories. The first category is persons who were questioned because evidence suggested that "they might have connections with, or possess information pertaining to, terrorist activity against the United States," and who subsequently were detained on immigration charges. Pet. App. 3a. With respect to some of those detainees, officials also determined that they may "have links to other facets of the investigation." *Ibid.* The (then) Immigration and Naturalization Service instituted removal proceedings against many of those aliens. Many

have been deported. Others have been released. The detainees have been and remain free to contact reporters and to disclose their identities to the public. *Id.* at 3a.

The second category of detainees consists of individuals held on federal criminal charges. Pet. App. 3a-4a. While the nature of the charges pending against each criminal detainee varies, until the investigation is concluded, none can be eliminated as a potential source of relevant or probative information. Each criminal defendant who so desires has been provided court-appointed counsel and has been allowed to contact the press and the public. *Id.* at 4a.

The third category consists of persons detained after a federal court issued a material witness warrant to secure their testimony before a grand jury, pursuant to 18 U.S.C. 3144. Pet. App. 4a. Each material witness detained was found by a federal district court to have information "material to the events of September 11." *Ibid.* To ensure the secrecy of grand jury proceedings, the district courts before which the witnesses have appeared have issued sealing orders that prohibit the government from releasing any information about those proceedings. Individuals detained on material witness warrants have been provided court-appointed counsel and have been allowed to contact reporters or the public, *ibid.*, unless to do so would violate a court's particular sealing order.

3. Petitioners submitted three FOIA requests to the Department of Justice, seeking information about the individuals arrested or detained in connection with the terrorism investigation. More particularly, the FOIA requests sought (1) the detainees' names and citizenship status; (2) the locations where they were arrested and detained; (3) the dates they were arrested, the

dates any charges were filed, and the dates they were released; (4) the nature of any charges filed against them or other bases for detaining them; (5) the names and addresses of any attorneys representing them; (6) the identities of any courts that have been asked to enter orders sealing proceedings in connection with the detainees, copies of those orders, and the legal authorities relied on by the government in seeking those orders; and (7) any policy directives or guidance issued to officials that pertain to making public statements or disclosures about the detained individuals. Pet. App. 4a-5a.

The government released a significant amount of information in response to the FOIA requests, but withheld other information on the ground that it fell within FOIA Exemptions 7(A), 7(C), and 7(F). Those exemptions permit the withholding of information "compiled for law enforcement purposes" if its production

> (A) could reasonably be expected to interfere with enforcement proceedings, * * * (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, * * * or (F) could reasonably be expected to endanger the life or physical safety of any individual.

5 U.S.C. 552(b)(7).

With respect to the INS detainees, the government withheld the individuals' names, their locations of arrest and detention, the dates of their release, and the names of their lawyers. For the criminal detainees, the government withheld the dates and locations of their arrest and detention, the dates of their release, and their citizenship status. With respect to the material witnesses, the government withheld all requested infor-

mation based not only on the law enforcement exemptions, but also on FOIA Exemption 3, which applies to any information that is "specifically exempted from disclosure" by another statute, 5 U.S.C. 552(b)(3)—in this case, Federal Rule of Criminal Procedure 6(e), which restricts the release of information reflecting grand jury proceedings. Pet. App. 5a.[1]

4. Petitioners filed suit under FOIA to compel disclosure of the withheld information. In support of its withholding decision, the government submitted the declarations of two career officials with central responsibility for the ongoing terrorism investigation: James S. Reynolds, who was then the Chief of the Terrorism and Violent Crime Section of the United States Department of Justice, and Dale L. Watson, the FBI's Executive Assistant Director for Counterterrorism. See Pet. App. 106a-122a (Reynolds Decl.), 123a-127a (Supplemental Declaration of James S. Reynolds), 128a-138a (Watson Declaration). As relevant here, those declarations explain that release of the withheld information "could result in significant harm to the interests of the United States and compromise the September 11 and other ongoing terrorism-related investigations," *id.* at 111a, because it would effectively provide terrorist organizations with a roadmap of the government's terrorism investigation, *id.* at 112a, 125a. In particular, the declarations explain that releasing the requested information (i) would "undermine the ability of the

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[1] The basic prohibition against disclosure in Rule 6(e) was enacted into positive law by Congress, see Pub. L. No. 95-78, § 2(a), 91 Stat. 319, and thus qualifies as a statute barring disclosure for purposes of FOIA Exemption 3. See *Fund for Constitutional Gov't* v. *National Archives & Records Serv.*, 656 F.2d 856, 867-868 (D.C. Cir. 1981).

United States to obtain cooperation from knowledgeable witnesses," and could thereby "pave the way for additional terrorist activities," *id.* at 111a; (ii) could lead to the premature public identification "of individuals associated with [the detainees], other investigative sources, and potential witnesses," *ibid.*; (iii) could make the detainees vulnerable to "intimidation or harm" by terrorist groups or others, "thereby discouraging or preventing them from supplying valuable information or further leads," *id.* at 111a-112a; (iv) could cause terrorist organizations to alter or cease their interactions with released individuals, thereby "eliminat[ing] valuable sources of information" and "impair[ing] the government's ability to infiltrate terrorist organizations," *id.* at 112a; (v) "would reveal the direction and progress of the investigation by identifying where [the government] is focusing its efforts," and causing terrorists to "alter their plans in a way that presents an even greater threat to the United States," *ibid.*, and (vi) "could allow terrorist organizations and others to interfere with the pending proceedings by creating false or misleading evidence," *id.* at 113a. Just as importantly, the comprehensive disclosure sought by petitioners would reveal to terrorists which persons the government has *not* detained and where and when arrests have *not* been made. *Id.* at 125a, 133a. Finally, the declarations explained that the investigation "is fluid and evolving," so that "the significance of a given detainee may change over time." *Id.* at 125a.

The district court granted partial summary judgment in petitioners' favor. Pet. App. 64a-103a. The court found there was "no question" that the records qualified as law enforcement records, within the meaning of FOIA Exemption 7, and agreed that the investigation was ongoing. See *id.* at 75a n.8, 91a-92a. The court

nevertheless concluded that the names of the detainees did not fall within Exemption 7(A) because their release could not reasonably be expected to interfere with the ongoing enforcement proceedings. *Id.* at 75a-84a. In so holding, the court accorded the government's predictive judgments of harm no deference because, in the district court's view, such deference is appropriate only when the government seeks to protect information affecting the national security under FOIA Exemptions 1 and 3. *Id.* at 81a, 89a. The court further held that it could not properly consider the use that terrorist groups might make of the aggregate disclosure of information because, as a matter of law, such "mosaic" analyses of the national security and intelligence consequences of disclosure are not cognizable under Exemption 7(A). *Id.* at 82a-83a.[2]

The district court agreed with the government, however, that the dates and locations of arrest, detention, and release were properly withheld under Exemption 7(A), because disclosure of that information "would be particularly valuable to anyone attempting to discern patterns in the Government's investigation and strategy" and would make detention facilities "vulnerable to retaliatory attacks." Pet. App. 91a. Finally, the court rejected petitioners' arguments that the First Amendment and the common law entitle them to the requested information. *Id.* at 97a-100a.

5. a. The court of appeals reversed in part, affirmed in part, and remanded with instructions to dismiss the case. Pet. App. 1a-63a. The court held that Exemption 7(A) authorizes the withholding of all of the requested information, and it therefore did not address the other

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[2] The district court also rejected the government's reliance on Exemptions 3, 7(C), and 7(F). Pet. App. 84a-89a.

exemption claims. *Id.* at 12a. As an initial matter, the court agreed with the district court that the names of the detainees were "compiled for the 'law enforcement purpose' of successfully prosecuting the terrorism investigation." Pet. App. 13a-14a.

The court of appeals then held (Pet. App. 14a) that disclosure of the names would be "reasonably likely to interfere with enforcement proceedings." In so holding, the court recognized that "the judiciary owes some measure of deference to the executive in cases implicating national security, a uniquely executive purview." *Ibid.* (citing *Zadvydas* v. *Davis*, 533 U.S. 678, 696 (2001)). That is because Exemption 7(A) calls for "a predictive judgment of the harm that will result from disclosure of information," and, in the context of this case, "the government's top counterterrorism officials are well-suited to make this predictive judgment," while the judiciary "is in an extremely poor position to second-guess" it. Pet. App. 17a.

The court of appeals further recognized that "the government's expectation that disclosure of the detainees' names would enable al Qaeda or other terrorist groups to map the course of the investigation and thus develop the means to impede it is reasonable." Pet. App. 17a. The court explained that a "complete list of names informing terrorists of every suspect detained by the government at any point during the September 11 investigation would give terrorist organizations a composite picture of the government investigation," and thus "would inform terrorists of both the substantive and geographic focus of the investigation." *Ibid.* In addition, by informing terrorists "which of their members were compromised by the investigation, and which were not," release of the information "could allow terrorists to better evade the ongoing investi-

gation and more easily formulate or revise counter-efforts." *Id.* at 18a. The court also reasoned that disclosure could be expected to "deter or hinder cooperation by detainees." *Id.* at 19a. Lastly, the court affirmed the district court's rejection of petitioners' First Amendment and common law arguments. *Id.* at 27a- 32a.

b. Judge Tatel dissented. Pet. App. 35a-63a. He would have held that the declarations submitted by the government were insufficient to sustain the invocation of Exemption 7(A), *id.* at 39a, because those declarations did not establish that all of those detained during the terrorism investigation in fact have links to terrorism, *id.* at 43a. Judge Tatel would have remanded for the government to submit more particularized explanations of the bases for withholding, *id.* at 62a.

ARGUMENT

1. *The Court Of Appeals Applied Settled Principles Of Law Under FOIA Exemption 7(A).* Petitioners do not dispute that their request seeks "law enforcement records," within the meaning of FOIA Exemption 7(A). Nor do they dispute that the investigation to which the law enforcement records pertain is ongoing and implicates, as even the dissent acknowledged (Pet. App. 35a), "uniquely compelling governmental interests." The narrow question resolved by the court of appeals thus was simply whether disclosure of a comprehensive list of individuals interviewed and then detained by investigators in connection with the ongoing terrorism investigation "could reasonably be expected to inter-

fere" with that investigation, 5 U.S.C. 552(b)(7)(A), based on the particular declarations filed in this case.[3]

In any ongoing law enforcement investigation, requiring the police to open their investigative files and provide a comprehensive list of the persons interviewed and detained—and, by the same token, to reveal which persons they have not interviewed and detained—would necessarily interfere with the investigation by providing a roadmap of law enforcement's activities, strategies, and methods. Furthermore, disclosure of such a list could reasonably be expected to expose the identified individuals to harassment and intimidation and could destroy any ongoing intelligence value they might have. Indeed, were a comparable FOIA request to be submitted by gang members or the head of an organized crime family, the harm that would be occasioned by disclosing a comprehensive list of persons

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[3] Petitioners' repeated claim (Pet. 1, 16, 17, 25) that the court of appeals' decision somehow ratified "secret arrests" overlooks that this is a FOIA case, not a habeas corpus case, and that *every* individual detained has had the opportunity for all of the judicial review of his detention and other legal issues that federal law and the Constitution require, and also was free to talk to the press or public. Pet. App. 3a-4a. Any secrecy surrounding the arrests is thus the product of private choice, not governmental dictate. The fact that most individuals have elected to preserve their privacy provides no basis for requiring the government to open its files in an ongoing law enforcement investigation to scrutiny not just by petitioners, but by the very targets of that investigation. Moreover, the government's handling of the INS detentions has already been exhaustively evaluated in a publicly released report by the Department of Justice's Inspector General. See Department of Justice, Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (Apr. 2003).

interviewed and detained as part of an ongoing investigation into gang activities or organized crime would be self-evident and would be at the core of what Exemption 7(A) is designed to protect. See, *e.g.*, *Manna* v. *Department of Justice*, 51 F.3d 1158, 1165 (3d Cir.) (Exemption 7(A) protects against disclosure of the "names of interviewees, informants, witnesses, victims and law enforcement personnel" involved in an investigation of the Genovese crime family), cert. denied, 516 U.S. 975 (1995); see also *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 232 (1978) ("[T]he release of information in investigatory files prior to the completion of an actual, contemplated enforcement proceeding was precisely the kind of interference that Congress continued to want to protect against.").

The court of appeals applied that same straightforward analysis to the government's ongoing investigation into the September 11th attacks and related terrorist threats. And it reached the same conclusion: disclosing a list of individuals interviewed and detained —which simultaneously identifies for terrorist organizations those persons who have *not* been interviewed and detained—"could reasonably be expected to interfere" with the ongoing investigation.

Petitioners repeatedly object (Pet. 19, 23-24) that the government's analysis of the threat posed to its investigation was not sufficiently particularized. That record-bound argument overlooks this Court's controlling precedent applying Exemption 7(A). In *NLRB* v. *Robbins Tire & Rubber Co.*, *supra*—a case that is not cited or discussed anywhere in the petition—this Court held that the government may invoke FOIA Exemption 7(A) to protect against interference with law enforcement proceedings without making the type of page-by-page or document-by-document showing required to

invoke other FOIA exemptions. Rather, under Exemption 7(A), "certain generic determinations might be made." 437 U.S. at 224; see also *id.* at 236 (similar). The Court deemed such an approach to be necessary to protect against premature disclosure of the government's investigative or litigation strategy and, more particularly, "to prevent harm [to] the Government's case in court," *id.* at 224 (internal quotation marks and citations omitted); to prevent litigants from obtaining "earlier and greater access" to government investigatory files than they "would otherwise have," *id.* at 241; and to protect prospective witnesses and those cooperating with the government from harassment and intimidation, *id.* at 239-240.

A list of persons interviewed in an ongoing criminal investigation merits the same categorical protection accorded witness statements in *Robbins Tire.* For criminal investigations—especially ones involving grave, ongoing threats to the national security, intelligence operations, and sophisticated international crimes—disclosure of interview lists "would generally 'interfere with enforcement proceedings,'" 437 U.S. at 236, by prematurely revealing the government's investigative strategies, tactics, and focus, and also by opening the contacted individuals to coercion, intimidation, and unwanted exposure.

That conclusion is reinforced by amendments to Exemption 7(A) that Congress has enacted since *Robbins Tire* was decided. At the time of the Court's decision in *Robbins Tire*, Exemption 7(A) applied to law enforcement records where release "would * * * interfere with enforcement proceedings." 437 U.S. at 223. The subsequent enactment of the Freedom of Information Reform Act of 1986 (Reform Act), Pub. L. No. 99-570, § 1802, 100 Stat. 3207-48, reinforced the

validity of a categorical, pragmatic approach to applying Exemption 7(A). The Reform Act amended Exemption 7(A) to cover law enforcement records the release of which "could reasonably be expected to interfere with enforcement proceedings," 5 U.S.C. 552(b)(7)(A), thereby easing the government's burden. As the legislative history explains, that change "recognizes the lack of certainty in attempting to predict harm," and thus requires only "a standard of reasonableness in that process, based on an objective test." S. Rep. No. 221, 98th Cong., 1st Sess. 24 (1983); see *Department of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 778 n.22 (1989) (explaining that the parallel amendment to Exemption 7(C) "amply supports a categorical approach to the balance of private and public interests" under that exemption).[4] Under the categorical approach permitted by Exemption 7(A), the agency satisfies its burden of justifying withholding if it "trace[s] a rational link" between the nature of the requested documents and the interference with enforcement proceedings that could be expected to result from disclosure. *Crooker* v. *Bureau of Alcohol, Tobacco & Firearms*, 789 F.2d 64, 67 (D.C. Cir. 1986)

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[4] The courts of appeals have repeatedly recognized that the Reform Act effectively broadened the coverage of Exemption 7(A) and reinforced the need for a pragmatic approach. See, *e.g.*, *Manna*, 51 F.3d at 1164 n.5 (Congress amended Exemption 7(A) to "relax significantly the standard for demonstrating interference"); *Alyeska Pipeline Serv. Co.* v. *EPA*, 856 F.2d 309, 311 n.18 (D.C. Cir. 1988) (trial court, in relying on pre-amendment version of Exemption 7(A), improperly "required EPA to meet a higher standard than FOIA now demands"); *Curran* v. *Department of Justice*, 813 F.2d 473, 474 n.1 (1st Cir. 1987) ("[T]he drift of the changes is to ease—rather than to increase—the government's burden in respect to Exemption 7(A).").

(R.B. Ginsburg, J.). The government amply satisfied that burden in this case.

2. *The Court Of Appeals Correctly Upheld Withholding Of The Particular Records At Issue.* In the face of the court of appeals' adherence to and application of traditional Exemption 7(A) principles, petitioners do not argue that this Court's review is necessary to resolve an inter-circuit conflict pertaining to the operation of Exemption 7(A). There is none. To the contrary, the court of appeals' decision here parallels the Third Circuit's decision in *Manna*, which likewise sustained the withholding under Exemption 7(A) of a list of persons interviewed as part of an investigation into a "violent and retaliatory" criminal organization, the Genovese crime family. *Manna*, 51 F.3d at 1165.

Petitioners, instead, seek this Court's review because they disagree (Pet. 18-25) with the court of appeals' application of settled Exemption 7(A) law in the particular circumstances of this case. Petitioners' record-bound disagreement with the application of a FOIA exemption in one particular case, however, is not the type of issue that merits an exercise of this Court's certiorari jurisdiction. That is especially so because the information petitioners seek to have disclosed to the public in this case is independently protected from disclosure by Exemptions 7(C) and 7(F) and, for the information pertaining to material witnesses, by Exemption 3.

In any event, there is no merit to petitioners' objections to the court's conclusion that the declarations submitted by the government justified withholding under Exemption 7(A). Those declarations plainly "trace a rational link," *Crooker*, 789 F.2d at 67, between the nature of the records that petitioners seek

to have made public and the harm to the ongoing criminal investigation and to the national security that production could occasion.

a. Petitioners first contend (Pet. 18-20) that the court of appeals erred in according a degree of deference to the government's assessment of the harm to national security that premature disclosure of the investigative information would entail. Indeed, petitioners question (Pet. 18) whether any deference is appropriate at all under Exemption 7(A), suggesting (as did the dissenting judge in the court of appeals, Pet. App. 38a-39a) that such deference is appropriate only when the government invokes the FOIA exemptions for classified information (Exemption 1) or intelligence information (under Exemption 3). That argument is meritless. The deference accorded the Executive Branch's judgments concerning matters of national security, foreign intelligence operations, and the operations of international terrorist organizations is not based on the particular FOIA exemption at issue or the text of Exemptions 1 and 3. Rather, such deference is compelled by the Constitution's separation of powers:

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to

> belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & S. Air Lines, Inc. v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); accord *Zadvydas* v. *Davis*, 533 U.S. 678, 696 (2001) ("terrorism or other special circumstances" may warrant "heightened deference to the judgments of the political branches"); *CIA* v. *Sims*, 471 U.S. 159, 176 (1985) (the Constitution assigns to the Executive the "complex political [and] historical" judgments that underlie intelligence judgments, because judges "have little or no background in the delicate business of intelligence gathering").

As the court of appeals explained, in any Exemption 7(A) case, application of the exemption "explicitly requires a predictive judgment of the harm that will result from disclosure of information, permitting withholding when it 'could reasonably be expected' that the harm will result." Pet. App. 17a (quoting 5 U.S.C. 552(b)(7)(A)). As the court of appeals further explained, in the context of the present investigation, "[i]t is abundantly clear that the government's top counterterrorism officials are well-suited to make this predictive judgment," and, "[c]onversely, the judiciary is in an extremely poor position to second-guess the executive's judgment in this area of national security." *Ibid.* Neither petitioners nor the dissenting opinion below explains why the Executive's ability to trace a rational link between disclosure of law enforcement records and the resulting harm is somehow diminished, and the Judiciary's relative aptitude to assess whether release of such information would undermine an ongoing terrorism investigation is somehow enhanced, simply because this case involves *both* vital national security

and intelligence concerns *and* an ongoing law enforcement operation.

b. Petitioners argue secondly that the court of appeals should have distinguished between "innocent" (Pet. App. 22a-23a) detainees and those actually charged with terrorism-related offenses. Again, even assuming that such record-bound arguments would warrant an exercise of this Court's certiorari jurisdiction, that argument fails to come to grips with the basis for Exemption 7(A)'s application here. That exemption applies because petitioners seek quintessential and acutely sensitive investigative information—a list of those persons who have and, by implication, those who have not been interviewed and detained in an ongoing criminal probe. As with many criminal investigations, the value and sensitivity of that information is not limited by whether particular interviewees themselves are suspected of committing crimes or with the content of the information they provide, the significance of which can change as the investigation proceeds.

Moreover, the fact that a particular individual has not been formally charged in immigration or criminal proceedings with terrorism-related activities does not mean that he is "innocent" or that he had no connection to or information concerning terrorist groups. For example, when an alien suspected of terrorist activities is also unlawfully present in the United States, he can be readily removed on the basis of his unlawful presence alone, without risking the harms to the ongoing investigation and sensitive intelligence matters that might result from seeking to establish terrorism-related grounds for his removal as well.

c. Petitioners assert (Pet. 21) that the government's rationale is undercut by the fact that those interviewed and detained are themselves free to disclose their

status to the public. Again, that argument misses the point. In the first place, in virtually any law enforcement investigation, persons who have been questioned are free to disclose their individual involvement. But that has never been thought to bar a federal law enforcement agency from invoking Exemption 7(A) to prevent such information from being disclosed or publicly confirmed by the government.

Moreover, in the present case, there is a significant qualitative difference in the value to international terrorists of, on the one hand, isolated self-identification by a few individuals who have been interviewed and detained, and, on the other hand, an official and comprehensive listing by the government of all individuals it has interviewed and detained. Even if, in fact, every individual chose to identify himself publicly, international terrorists would have no way of knowing whether everyone had come forward unless and until the government provided official confirmation. Thus, petitioners are simply wrong in contending (Pet. 21) that "the detainees themselves could bring about most or all of the harms cited." In reality, only a few individuals have chosen to publicize their detention in connection with the terrorism investigation. As the court of appeals noted (Pet. App. 21a), that fact provides implicit practical confirmation of the concerns for retaliation, harassment, and privacy identified in the declarations as grounds for withholding the names and related information that petitioners insist must be made public.

Indeed, because of those concerns, the information petitioners seek was also withheld on the basis of Exemption 7(C), which protects law enforcement records the production of which "could reasonably be expected to constitute an unwarranted invasion of personal

privacy," and Exemption 7(F), which applies where release "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. 552(b)(7)(C) and (F). "Numerous courts of appeals have recognized that individuals involved in a criminal investigation—including suspects, witnesses, interviewees, and investigators—possess privacy interests, cognizable under Exemption 7(C), in not having their names revealed in connection with disclosure of the fact and subject matter of the investigation." *Landano* v. *Department of Justice*, 956 F.2d 422, 426 (3d Cir. 1992) (citing cases), vacated on other grounds, 508 U.S. 165 (1993).[5] That interest is especially strong in connection with the investigation arising out of the September 11 terrorist attacks. And with respect to Exemption 7(F), the concern for "endanger[ing] the life or physical safety of any individual" applies not only to the interviewees themselves, but also to persons who would be harmed by any future terrorist activity that could be caused by the release of investigative information. Although the court of appeals found it unnecessary to consider the applicability of those additional exemptions (or Exemption 3) because of its ruling that all of the requested information is protected by Exemption 7(A), those exemptions provide independent grounds for withholding the information that petitioners seek and therefore would furnish alternative grounds for affirmance of the judgment below.

d. Lastly, petitioners argue (Pet. 21-22) that the declarations are flawed because the government has released some information about a few detainees. That

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[5] See *Neely* v. *FBI*, 208 F.3d 461, 464-465 (4th Cir. 2000); *Manna*, 51 F.3d at 1166; *Burge* v. *Eastburn*, 934 F.2d 577, 579 (5th Cir. 1991); *Fitzgibbon* v. *CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990).

argument "overlooks the political realities of intelligence operations in which, among other things, our Government may choose to release information deliberately to 'send a message' to allies or adversaries." *Sims*, 471 U.S. at 180. In any event, as the court of appeals explained (Pet. App. 22a), "[t]he disclosure of a few pieces of information in no way lessens the government's argument that complete disclosure would provide a composite picture of its investigation and have negative effects on the investigation." Nothing in FOIA makes governmental openness an all-or-nothing proposition, and it would be perverse to construe the statute to punish the government for making those disclosures that were consonant with its ongoing national security and law enforcement interests.

3. *Petitioners' First Amendment Claim Does Not Merit Review.* Petitioners also seek this Court's review (Pet. 25-30) of their claim that the First Amendment mandates disclosure of the requested information. That claim was rejected by both the district court (Pet. App. 97a-99a) and the court of appeals (*id.* at 28a-32a). Petitioners identify no conflict in the circuits on that question. Nor does the court of appeals' ruling conflict with any decision of this Court. Quite the contrary, the Court has made clear that the First Amendment does not "mandat[e] a right of access to government information or sources of information within the government's control." *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 15 (1978) (plurality opinion of Burger, C.J.). "The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act." *Id.* at 14. Indeed, the court of appeals' decision wholly accords with this Court's acknowledgment that the government "could decide not to give out arrestee information at all without violating the First Amendment." *Los Angeles*

Police Dep't v. *United Reporting Publ'g Co.*, 528 U.S. 32, 40 (1999).

To be sure, this Court has held that there is a First Amendment right of access to criminal trial proceedings. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980). But the Court based that conclusion on a 1000-year "unbroken, uncontradicted history" of public access to criminal trials and a tradition in which public access was thought to "inhere[] in the very nature of a criminal trial." *Id.* at 573; see *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1, 8 (1986) (elaborating on the "right of access to criminal proceedings"). That rationale does not apply to proceedings in the Executive Branch, much less to Executive Branch *records*. To the extent petitioners argue otherwise, this Court recently denied certiorari on a First Amendment claim of access to Executive Branch proceedings. *North Jersey Media Group* v. *Ashcroft*, 123 S. Ct. 2215 (2003) (petition asserted First Amendment right of access to removal proceedings for aliens of special interest to the September 11th terrorism investigation). That same disposition is appropriate for petitioners' claim of a First Amendment right of access to government records.[6]

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[6] Because the decision below concerns the right of access to background *investigatory records*, as opposed to judicial or administrative *adjudications*, the court of appeals' decision does not conflict with *Detroit Free Press* v. *Ashcroft*, 303 F.3d 681 (6th Cir. 2002). See Pet. App. 32a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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CENTER FOR NATIONAL SECURITY STUDIES, *et al.*,
Petitioners,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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TABLE OF AUTHORITIES

CASES

Los Angeles Police Department v. United Reporting Publishing Corp., 528 U.S. 32 (1999) 6-7

Manna v. Department of Justice, 51 F.3d 1158 (3d Cir. 1995) 5

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978) 5

New York Times Co. v. United States, 403 U.S. 713 (1971) 8

Richmond Newspapers Inc. v. Virginia, 448 U.S. 555 (1980) 6

STATUTES AND REGULATIONS

5 U.S.C. § 772(b)(7)(C) 10

5 U.S.C. § 772(b)(7)(F) 10

Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities, 68 Fed. Reg. 4364 (Dep't of Justice Jan. 29, 2003) (Final Rule) 2

Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities, 67 Fed. Reg. 19508 (Dep't of Justice April 22, 2002) (Interim Rule) 2

LEGISLATIVE MATERIAL

DOJ Oversight Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Senate Comm. of the Judiciary, 107th Cong. (Nov. 28, 2001) (Testimony of Michael Chertoff, Assistant Attorney General) (available at http://www.senate.gov/~judiciary/testimony.cfm?id=126&wit_id=66) 3

MISCELLANEOUS

Brief For The United States As *Amicus Curiae, Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999) (No. 98-678) 7

Bureau of Justice Statistics, *Report on the National Task Force on Privacy, Technology, and Criminal Justice Information*, NCJ 187669 (Aug. 2001) 6

Dan Eggen, *Deportee Sweep Will Start With Mideast Focus*, Wash. Post, Feb. 8, 2002 9

The Federalist No. 84 (Alexander Hamilton) 6

http://www.usdoj.gov/opa/pr/2001/December/01_ag_663.htm 9

Office of the Inspector General, Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York (Dec. 2003) (available at http://www.usdoj gov/oig/special/0312/final.pdf) 1

Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003) (available at http://www.usdoj.gov/oig/special/03-06/full.pdf)..... 1, 2, 4

Petition for Certiorari, *M.K.B. v. Warden* (U.S. filed July 10, 2003) (No. 03-6747)..... 3

ARGUMENT

For the first time in our history, the Government has detained hundreds of people for weeks or months and kept the names of the detainees secret. The Government's opposition trivializes and misstates the circumstances surrounding these detentions, and falsely characterizes this case as involving a fact-bound garden-variety FOIA request. On the contrary, this case presents an unprecedented claim to secrecy for mass arrests by the Government and requires review by this Court.

1. This is not an ordinary case by any standard. The United States government rounded up hundreds of Arabs and Muslims in the weeks following September 11 on the flimsiest of "tips" and detained them for weeks or months thereafter. *See* Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks*, at 15-16 (April 2003) (available at www.usdoj.gov/oig/special/03-06/full.pdf) ("OIG Report"). Many detainees were not charged with anything at all for long periods and the INS adopted a blanket policy to deny bail without regard to individualized circumstance. OIG Report at 35, 76-77, 87-88. In the end, those whose identities were kept secret were at most charged with civil immigration violations.

A supplemental report just released by the OIG, focusing on only one facility, provides new evidence of abuse, both physical and verbal, inflicted upon detainees by prison officials. Office of the Inspector General, *Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York*, at 10, 12, 16, 18, 25, 27, 46 (Dec. 2003) (available at http://www.usdoj.gov/oig/special/0312/final.pdf.). While these early reports confirm widespread abuses, the public record is still incomplete. The Court of

Appeals' decision prevents a full accounting of government actions and invites future abuses.

2. The Government took unprecedented and extraordinary steps to keep secret from the American public the identities of these individuals whom it jailed. The Government's contention that "[a]ny secrecy surrounding the arrests is . . . the product of private choice, not governmental dictate" is thus flat out wrong. Opp. Cert. at 11 n.3.

On September 21, the Attorney General ordered the INS to keep all proceedings concerning the INS detainees secret, to keep their names off jail and court dockets and to prohibit government employees from publicly acknowledging their existence.[1] The Justice Department made extensive efforts to keep the detainees' names from appearing on public logs of jail inmates. Their names were not included in the Bureau of Prisons Inmate Locator database and when family or attorneys inquired at federal jails in New York about specific individuals, they were falsely told that the individuals were not there.[2] When the New Jersey ACLU sued for a list of federal inmates being held in two New Jersey state jails pursuant to state law requiring a public jail roster, the Department of Justice intervened and issued a new regulation forbidding the state from releasing the names.[3]

As to individuals detained on material witness warrants, the Government evidently routinely obtained

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[1] *See* Memorandum from Chief Immigration Judge Michael Creppy to all Judges; Court Administrators, Sept. 21, 2001, Exhibit 57, Pl.'s Cross-Mot. for Summ. Judg. and Opp. to Def.'s Mot. for Summ. Judg. (March 18, 2002).

[2] OIG Report at 115-116.

[3] Release of Information Regarding Detainees in Non-Federal Facilities, 67 Fed. Reg. 19508 amending 8 CFR Parts 236 and 241 (Dep't of Justice, April 22, 2002) (Interim Rule); Release of Information Regarding Detainees in Non-Federal Facilities, 68 Fed. Reg. 4364-67 (Dep't of Justice, Jan. 29, 2003) (Final Rule).

orders sealing the relevant facts as to their identity; some of the orders apparently also prevented the detainee and his lawyer from informing the outside world about their detention. *See* Opp. Cert. at 4 ("[material witness detainees] have been allowed to contact reporters or the public, *ibid.*, *unless* to do so would violate a court's particular sealing order"(emphasis added)). Despite petitioners' request, the Government still refuses even to identify which courts issued such sealing orders, much less the terms of those orders. The Government may also have obtained orders in habeas proceedings brought by detainees which not only sealed the substance of those proceedings, but also the detainee's identity. *See* Petition for Certiorari, *M.K.B. v. Warden* (U.S. filed July 10, 2003) (No. 03-6747). Because of these extreme secrecy measures, we do not yet know the extent of the Government's secrecy regime.

The Government also took draconian measures to prevent the detainees themselves from disclosing the fact of their detention. Contrary to the Government's assertion, the Government did prevent the detainees from exercising their "private choice" to inform even their families or attorneys of their detention.[4] As confirmed by the OIG Report, "officials imposed a 'communications blackout' specifically for September 11 detainees within a week of the terrorist attacks. During this blackout, detainees were not permitted to receive any telephone calls, visitors, or mail, or to place any

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[4] The Government's secrecy regime allowed it to falsely claim to Congress and the public that no one was being held incommunicado. *See, e.g.*, *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Senate Comm. on the Judiciary*, 107th Cong. (Nov. 28, 2001) (Testimony of Michael Chertoff, Assistant Attorney General) (available at http://www.senate.gov/~judiciary /testimony.cfm?id=126&wit_id=66) ("Every one of the persons detained, whether on criminal or immigration charges or as a material witness has the right to make phone calls to family and attorneys. None is being held incommunicado.")

telephone calls or send mail." OIG Report at 158-59.[5] In any event, relying on the government to allow an individual to exercise a "private choice" to disclose the fact of his detention does not meet the constitutional requirement that the government keep public records of the names of those it jails so as to protect against abuses.

If the Government had followed the time-honored procedures regarding detention, the names of the individuals jailed after September 11 would have appeared in public records and the public could have determined from those records who was arrested, without asking for the names of detainees arrested in the wake of September 11.[6] *See* Brief *Amici Curiae* The Washington Post, et al. in Support of Petitioners at 6-10. Because of the Government's extraordinary secrecy measures, however, petitioners had no choice but to request the names of those who were detained.[7]

3. There is no merit to the Government's characterization of this case as a record-bound disagreement regarding application of settled principles of law. Opp. Cert. at 15. In reality, the Government asserted and the Court of Appeals adopted, a new and dangerous principle of law: that the Government may withhold the identities of detainees who are not criminally charged on the same basis as it withholds all other law enforcement-related information.

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[5]The Inspector General found that "[t]he first legal call made by any September 11 detainee, according to these three sources, was not until October 15, 2001." OIG Report at 132-33. The Government also kept secret the arrests of foreign nationals, even when their governments formally inquired about them. *See* Pet. 7 n.8

[6]The Government could have satisfied petitioners' FOIA request by disclosing jail logs and copies of charging documents served on detainees rather than by providing a "list."

[7]Indeed, even when the New Jersey ACLU sought the names of *all* federal detainees in New Jersey jails, without reference to those detained in connection with September 11, the Justice Department stepped in to prevent their release. *See supra* note 3.

This principle, which gives no weight whatsoever to the significance of the public's right to know how the Government exercises its awesome power to deprive people of their liberty, deserves review by this Court.

In its brief, the Government ignores the significance of detention by relying on FOIA cases that allowed it to withhold the names of individuals it had merely *investigated* as opposed to jailed. For example, in *Manna v. Department of Justice*, 51 F.3d 1158 (3d Cir. 1995). The court denied a convicted mafia member's FOIA request to obtain the "names of interviewees, informants, witnesses, victims and law enforcement personnel" involved in his prosecution. *Id.* at 1165; *see also NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 232 (1978) (FOIA request for "investigatory files"). But the FOIA requests in those cases were significantly different from the one at issue here because they did not seek the names of people the Government had actually arrested and detained. *Manna* is not a case where the Government had arrested hundreds of individuals of Italian descent and then refused to release their names after detaining them for months without criminally charging them. Neither *Manna* nor any other FOIA case approves treating the non-disclosure of the names of detainees the same as the non-disclosure of other law enforcement information.

Indeed, earlier in this litigation the Government itself acknowledged the significance of detention. It provided petitioners with a list of the names of the approximately 129 September 11 detainees who were criminally charged, even though such disclosure posed essentially the same risk of harm under section 7 of the FOIA as disclosure of the names of the remainder of the detainees. The Government stated that it was constitutionally required to give petitioners the names of the criminally charged detainees. *See* Defs. Reply in Support of Mot. for Summ. J. at 19 (filed April 15, 2002). But under the First Amendment, the Government is also

required to release the names of those detainees who were not criminally charged.

This Court has articulated the "experience and logic" test for determining the reach of the First Amendment in a series of cases beginning with *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 565-72 (1980). Both elements of the test are satisfied here. As to "experience," the Government has traditionally made public the identity of those it has detained from the time of the Founding to the advent of the modern police blotter. *See, e.g., The Federalist No. 84,* at 474-75 (Alexander Hamilton) (I. Kramnick ed. 1987); Bureau of Justice Statistics, *Report on the National Task Force on Privacy, Technology, and Criminal Justice Information*, NCJ 187669 at 13 (Aug. 2001) (indicating that every state makes its police departments' arrest and detention logs open for public inspection, regardless of whether the detainees have been charged with any crime). And the "logic" of requiring the Government to divulge the names of those it has imprisoned is clear: the public's interest in knowing whom the Government has imprisoned is just as strong—if not stronger—when the Government is detaining an individual who has not been charged with any crime, as to whom there has been no judicial finding of probable cause, as to whom speedy trial rights have not attached, and who is not entitled to the protection of the Sixth Amendment.

The Government declines to address these arguments head-on. Instead, it stretches dicta in *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32, 40 (1999) concerning the right of *businesses* to obtain the *addresses* of arrestees for commercial purposes. Nothing in that case suggests that the Government may withhold the names of those who have been imprisoned. In fact, the Government recognized this very point in its amicus brief in *LAPD*.

> A governmental decision not to provide any information about some or all arrests might raise different concerns, particularly if (as seems likely) there proved to be some historical tradition of making public at least some information about the exercise of that core government power. This case raises no such issue, because California continues to provide full public access to detailed information on every arrest and crime report--all information, indeed, except the "current address" of the crime victim or person arrested.

Brief For The United States As *Amicus Curiae*, at 27 n.15, *LAPD*, 528 U.S. 32 (1999) (No. 98-678).

Thus, this case raises the crucial question of the applicability of the First Amendment to the Government's suppression of the names of those it detains.

4. If the First Amendment applies to the Government's suppression of the names of those it detains, it is clear that disclosure is required in this case. The Government does not allege that any, much less every one, of the detainees is suspected, based on reliable information, of being a terrorist, or that their detention is unknown to Al Qaeda, or that disclosure of their detention would have substantial effects on its ability to prevent another terrorist attack.[8] Thus it has not shown a compelling interest in withholding the names of the detainees.

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[8] *Cf. New York Times Co. v. United States*, 403 U.S. 713, 730 (1971) (J. Stewart concurring) ("I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people.").

Even if the Government's refusal to disclose the names of the detainees is judged by the standards of FOIA exemption 7(A) rather than the First Amendment, there is no basis for the refusal. The Government affidavits fail to establish a nexus between disclosure and the alleged law enforcement harms or the required likelihood of harm. As the dissent points out, deference to Government assertions cannot override the logical and factual gaps in the Government's case. Pet. App. 39a-40a. (Tatel, J., dissenting).

The Government never claims in its affidavits that any, much less all, of the detainees are suspected terrorists.[9] To the contrary, it affirmatively acknowledges that many are not suspected of any links to terrorism and do not even "have information useful to the investigation."[10] Pet. App. 43a (Tatel, J., dissenting (quoting Reynolds Decl. ¶ 36, Pet. App. 120a)). Accordingly, the only claim of harm that could even conceivably apply to withholding all of the detainees' names is the Government's "investigation roadmap" argument. But there is no basis to conclude that the names of the detainees rounded up in the immediate aftermath of September 11 would provide terrorists with a valuable road map of the Government's investigation. The terrorists already know,

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[9] None of the detainees whose names are still being withheld have been charged with terrorism or any other crimes; and no more than a handful of the immigration charges against them relate to terrorism. *See* Def Amended Ex. 6 in Support of Gov't Mot. for Summ. Judg. (filed Feb. 5, 2002). While the Government is correct that it is hypothetically possible for the Government to have information linking an individual to terrorism and yet choose to charge him with unrelated and even non-criminal offenses, the Government never alleged that this hypothetical possibility applied to even a single detainee in this case.

[10] This acknowledgment is all the more notable because it is made with regard to the individuals detained as material witnesses, the only category of individuals, who otherwise might be presumed to have some relevant information. *See* Reynolds Decl. ¶ 36, Pet. App. 120(a).

from the Justice Department's public actions and statements, that the Government is focusing its investigation on Arab and Muslim males: the "roadmap" of the investigation is already a matter of public knowledge.[11]

All the other claims of harm by the Government – witness intimidation, etc. – could result from disclosure of a detainee's name only if that detainee had some involvement in terrorism and his detention was unknown to the terrorists. The Government never alleges the former and the latter is contradicted by the Government's assertion that individual detainees were always free to contact their associates and inform them of their detention. *See* Pet. at 21-23. It may be that there is a subset of detainees whose identities could be appropriately withheld, but the Government has not yet made out such a case.

5. The Government also argues that review is unwarranted because the Circuit Court did not decide whether the information may be withheld under Exemptions 7(C) and 7(F), which are concerned with the privacy of the detainees and their safety (and others'), respectively. *See* 5 U.S.C. § 772(b)(7)(C) & (F). This argument ignores the

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[11] Within weeks of the September 11 attacks, the Government disclosed that its detentions resulted from a focus on Arabs or Muslims attending flight schools and on those who had some contact, however minimal, with any of the hijackers. See Brief for Appellees/Cross-Appellants at 8 n.27, No. 02-5254 (D.C. Cir. filed Oct. 15, 2002). The broader sweep of the investigation was disclosed soon thereafter. On December 21, 2001, for example, the Justice Department issued a press release entitled "5000 Interviews Status Report" describing its program of interviews of persons from Islamic countries. *See* http:// www.usdoj.gov/opa/pr/2001/ December/01_ag_663.htm. On January 25, 2002, the Department announced that it would focus its efforts to find "absconders" – individuals subject to deportation orders who have not reported for deportation – on persons who come from countries in which there has been Al Qaeda terrorist activity. *See* Dan Eggen, *Deportee Sweep Will Start With Mideast Focus*, Wash. Post, Feb. 8, 2002, at A1.; *see also* OIG Report at 21.

applicability of the First Amendment principles at stake, which require disclosure of the names of the detainees. In any event, FOIA exemption 7(C) provides no basis for withholding the names because, as Judge Tatel noted in his dissent, any privacy interest that the detainees might have must be balanced against the important public interest "in knowing whether the government, in investigating [the crimes of September 11] is violating the rights of persons that it has detained." Pet. App. 51a (Tatel, J., dissenting).

It is hypocritical indeed for the Government to now argue that the privacy and safety interests of those it detained would be compromised by disclosure. The vast majority of individuals involved here appear to have been guilty of nothing more than civil immigration violations. It was the Government that branded them with the stigma of being associated with a terrorism investigation when it had no real basis for doing so. If the Government is concerned about harm to these detainees, it is free to make clear that the individuals whose names it releases had nothing to do with terrorism.

Respectfully Submitted,

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No. 03-472

In The Supreme Court of the United States

CENTER FOR NATIONAL SECURITY STUDIES, *et al.*,
Petitioners,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF *AMICI CURIAE* FOR THE WASHINGTON POST COMPANY AND TWENTY-TWO OTHER LEADING NEWSPAPERS, MAGAZINES, BROADCASTERS, AND MEDIA-RELATED PROFESSIONAL AND TRADE ASSOCIATIONS (LISTED ON THE INSIDE COVER) IN SUPPORT OF PETITIONERS

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38 pp

LIST OF *AMICI*

The Washington Post Company
ABC, Inc.
American Society of Newspaper Editors
The Associated Press
Association of American Publishers, Inc.
British Broadcasting Corporation
CBS Broadcasting, Inc.
Cable News Network L.P. LLLP
Gannett Company, Inc.
The Hearst Corporation
Magazine Publishers of America, Inc.
The McClatchy Company
National Broadcasting Company, Inc.
National Press Club
National Public Radio, Inc.
The New York Times Company
The Newspaper Association of America
North Jersey Media Group Inc.
Philadelphia Newspapers, Inc.
Radio-Television News Directors Association
Silha Center for the Study of Media Ethics and the Law
Society of Professional Journalists
Tribune Company

TABLE OF CONTENTS

INTEREST OF *AMICI* 1

ARGUMENT 1

I. The Court of Appeals' Decision is at Odds With the Traditional Ability of the Press and Public to Inspect Arrest and Jail Records. 3

A. Arrest and Jail Records Always Have Been Open to Inspection. 3

B. Disclosure of Arrest and Jail Logs Serves Vital Functions in Our System of Self-Government. 10

II. The Court of Appeals' Extreme and Categorical Deference to the Government's National Security Assertions Compounds the Threat Its Decision Poses to the Accessibility of Information Traditionally Available to the Press and the Public. 16

A. The Court of Appeals' Decision Grants Excessive Deference to Skeletal National Security Assertions 16

B. The Court of Appeals' Decision Adopts an Overly Broad "Mosaic" Rule. 18

CONCLUSION 20

APPENDIX A 1a

APPENDIX B 7a

TABLE OF AUTHORITIES

Cases:

Brown & Williamson Tobacco Corp. v. Federal Trade Commission, 710 F.2d 1165 (6th Cir. 1983) 13

Cal-Almond, Inc v. U.S. Department of Justice, 960 F.2d 105 (9th Cir. 1992) 10

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The Cleveland Co. v. Smith (Ohio Ct. Common Pleas July 21, 1920) 4

Coastal Delivery Corp. v. U.S. Customs Service, 272 F. Supp. 2d 958 (C.D. Cal. 2003) 19

County of Los Angeles v. Superior Court, 22 Cal. Rptr. 2d 409 (Cal. App. 1993) 6

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 15

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Dayton Newspapers v. City of Dayton, 341 N.E.2d 576 (Ohio 1976) 9

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Edmonds v. FBI, 272 F. Supp. 2d 35 (D.D.C. 2003) 19

Ferri v. Bell, 645 F.2d 1213 (3rd Cir. 1991) 19

Gifford v. Freedom of Information Commission, 631 A.2d 252 (Conn. 1993) 6

Hengel v. City of Pine Bluff, 821 S.W.2d 761 (Ark. 1991) 7, 8

Holcombe v. State, 200 So. 739 (Ala. 1941) 5
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In re Application & Affidavit for a Search Warrant, 923 F.2d 324 (4th Cir. 1991) 17
In re The Washington Post Co., 807 F.2d 383 (4th Cir. 1986) 1, 11, 17
Kimberlin v. Department of Justice, 139 F.3d 944 (D.C. Cir. 1998) 19
King v. Department of Justice, 830 F.2d 210 (D.C. Cir. 1987) 17, 19
Lebanon News Publishing Co. v. City of Lebanon, 451 A.2d 266 (Pa. Comm. Ct. 1982) 8
Lee v. Beach Publishing Co., 173 So. 440 (Fla. 1937) 5
Lieberman v. State Board of Labor Relations, 579 A.2d 505 (Conn. 1990) 10
Los Angeles Police Department v. United Reporting Publishing Corp, 528 U.S. 32 (1999) 7
McDonnell v. United States, 4 F.3d 1227 (3rd Cir. 1993) 19
Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969) 5
Newspapers, Inc. v. Breier, 279 N.W.2d 179 (Wis. 1979) 9, 12
North Jersey Media Group v. Ashcroft, 308 F.3d 198 (3rd Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003) 10
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 9, 10, 11, 14
Rugiero v. U.S. Department of Justice, 257 F.3d 534 (6th Cir. 2001) 19
Seattle Times Co. v. United States District Court, 845 F.2d 1513 (9th Cir. 1988) 12
Sheehan v. City of Binghampton, 398 N.Y.S.2d 905 (App. Div. 1977) 8
Sheridan Newspapers, Inc. v. City of Sheridan, 660 P.2d 785 (Wyo. 1983) 9, 12

State ex rel. Outlet Communications, Inc. v. Lancaster Police Department, 528 N.E.2d 175 (Ohio 1988) 7, 8

State v. Brown, 467 So. 2d 1151 (La. App. 1985) 7

Tennessean Newspaper, Inc. v. Levi, 403 F. Supp. 1318 (M.D. Tenn. 1975) 6, 7

Times Dispatch Publishing Co. v. Sheppard (Hustings Ct. of City of Richmond Jan. 13, 1933) 5

United States v. Moussaoui, 336 F.3d 279 (4th Cir. 2003) 17

U.S. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989) 20

Statutes:

5 U.S.C. § 552(b) 19

28 C.F.R. § 20.20(b)(2) (2003) 6

28 C.F.R. § 50.2(b) (2003) 6

4 D.C. Code § 135 (1955) 5

D.C. Official Code 5-113.01 5

Legislative History:

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INTEREST OF *AMICI*

Amici, which are listed on the inside cover and described in Appendix A, are leading newspapers, magazines, broadcasters, and media-related professional and trade associations in the United States and abroad.[1] They share an interest in enforcing the principles of transparency embodied in the Freedom of Information Act (FOIA) and the First Amendment. Of particular importance to this case, *Amici* have for centuries enjoyed access to the information contained in basic arrest and jail logs, and they traditionally have successfully invoked public records laws or the First Amendment whenever the government has tried to withhold such information.

Amici do not contend that their tradition of access to the information at issue here always trumps national security interests or that the government may never make a showing that a particular detainee's name must be withheld for a reasonable period of time. But the D.C. Circuit's decision here permits the Government to withhold basic facts regarding detainees based on nothing more than the incantation of "national security," without any individualized showing of need. Because this decision marks a sharp and particularly significant departure from heretofore established law and custom, *Amici* respectfully submit this brief in support of the petition for writ of certiorari.

ARGUMENT

This case involves access to information that is fundamental to our democracy. Because the government's power to deprive persons of their physical liberty is among its most awesome, basic arrest and jail records have always been available to the American press and the public as an essential check on this power. The D.C. Circuit majority, in fact, acknowledged that "arrest warrants, INS charging documents, and jail records . . . have traditionally been public." Pet. App.

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

13a. Yet the majority ruled that the Department of Justice could withhold the substance of these documents regarding several hundreds of detainees because divulging that information is reasonably likely to interfere with the government's terrorism investigation. Pet. App. at 14a-19a (rejecting FOIA claim) & 31a-32a (First Amendment claim).

This decision stands alone in condoning the categorical withdrawal of basic information regarding detainees from the public sphere and threatens the media's ability to perform their time-honored role of scrutinizing the government's use of its arrest power. Ever since law enforcement authorities have kept running records of individuals they take into custody, the press and the public have had access to these lists. The press has used this access to undertake important investigations and to convey critical information to the populace. Accordingly, it should come as no surprise that every time before this case that a governmental agency has attempted to systematically withhold such information, courts have invoked public records statutes or the First Amendment, or both, to require the government to resume disclosing the information.

This Court should grant certiorari to hold that principles of openness embodied in FOIA and the First Amendment require the same result here. Public scrutiny into the federal government's treatment of persons it believes (or believed) are connected with terrorism is, if anything, more important than shedding light on the prosecution of more conventional, local crime. The national security implications of terrorism investigations, to be sure, also are heightened. Such concerns may even permit withholding some names of some detainees upon an appropriate individualized showing. But this Court should not let a decision become precedent that effectively holds that the mere invocation of national security is *categorically* sufficient to relieve the government of its longstanding obligation to keep the public at least minimally apprised of how it is using some of its most invasive powers. Our forefathers, our legislators, and our courts have always – quite properly – demanded more.

I. The Court of Appeals' Decision is at Odds With the Traditional Ability of the Press and Public to Inspect Arrest and Jail Records.

The basic information that Petitioners seek here has been available to the press and public throughout American history. Before this case, in fact, no American court or legislature had ever suggested that releasing detainees' mere identities or other background information could impede the government's ability to investigate or prosecute crime. To the contrary, the universal view has always been that keeping arrest and jail records generally open promotes the proper functioning of the justice system and operates as an indispensable check on the government's power to deprive people of their physical liberty.

A. Arrest and Jail Records Always Have Been Open to Inspection.

The Petition for Certiorari discusses the rich history, reaching back to the earliest days of the Republic, of maintaining open arrest and jail records even in the midst of national security threats. *See* Pet. for Cert. at 27-28. But the governmental disclosures during these specific periods represent only a part of a broader, continuous custom – enforced by law when necessary – of keeping this basic information publicly available.

1. Pre-FOIA landscape

In the 1800's, as local police departments were created, the departments began keeping records that became known as "police blotters." While the precise information kept in these records varied (as it still does today), a police blotter generally "chronicle[s] each day's significant, formal criminal justice contacts between members of the police force and the public, such as arrests and detentions." U.S. Dept. of Justice, Criminal Justice Information Policy, *Original Records of Entry*, NCJ 125626 (1990), at 1. It records the names of all persons taken into custody and often includes the place and time of arrests, a brief physical description of detainees, the name of the arresting officers, and any allegations against detainees.

Walter A. Steigleman, *The Legal Problem of the Police Blotter*, 20 Journalism Q. 30, 30 (1943).

From their inception, police blotters have been made available to the press and the public. During the 1800's, newspapers often assigned a reporter to inspect blotters on a daily basis. *See* Frank Luther Mott, American Journalism: A History of Newspapers in the United States Through 250 Years 222 (1941) (describing press access to police blotter dating back to 1830's). Although it does not appear that this custom was systematically studied until the 1960's, research then confirmed that the overwhelming majority of jurisdictions allowed access to police blotters, even though most of these jurisdictions were not required to do so by statute. In 1966, a random sample by the American Bar Association found that 93% of local police chiefs permitted access to their blotters. ABA, *Standards Relating to Fair Trial and Free Press*, at 230-31 (1966). A concurrent ABA survey of 16 newspaper editors revealed that police departments made their blotters available in every instance. *Id.* at 242. In another study, 31 of 33 state attorneys general responded that police departments in their state allowed reporters and the public to inspect blotters upon demand. Michael J. Petrick, *The Press, the Police Blotter, and Public Policy*, 46 Journalism Q. 475, 477 (1969).

In the handful of instances during this period in which law enforcement adopted policies of blocking access to these basic arrest or jail records, every court to confront the issue required officials to disclose those records. In the earliest such decision, an Ohio court in 1920 admonished the Cleveland police chief for closing the city's police blotters and held that the First Amendment entitled the press to inspect those records. *The Cleveland Co. v. Smith* (Ohio Ct. Common Pleas July 21, 1920), *reprinted in* Harold L. Cross, The People's Right to Know 95 (1953). A 1933 Virginia decision granted a writ of mandamus permitting newspapers to inspect city "police blotters, the list of arrested persons, with their descriptions," ruling that withholding such access impinged "the constitutional rights of petitioners and the security and protection of

the public and arrested persons as well." *Times Dispatch Publishing Co. v. Sheppard* (Hustings Ct. of City of Richmond Jan. 13, 1933), *reprinted in* Cross, *supra*, at 100. The Florida and Alabama Supreme Courts similarly made it clear on statutory grounds that official documents listing names of arrestees were "public records." *Lee v. Beach Publishing Co.*, 173 So. 440 (Fla. 1937) (police department books); *Holcombe v. State,* 200 So. 739, 748 (Ala. 1941) ("jail dockets"). In 1953, a study of court decisions could find only one decision leaving disclosure of arrest logs to the discretion of a police department, and even there the department had permitted public inspection of these logs "for a long period of years." Cross, *supra*, at 102.

Legislatures sometimes acted even before courts could get involved. In 1954, when the District of Columbia attempted to impose limitations on access to its arrest records, Congress reacted promptly and decisively, just as it had almost one hundred years before, during the Civil War. *See* Pet. for Cert. at 27-28. Recognizing the "long custom and practice" of "keeping arrest books and [making] them available for public inspection," the House Committee on the District of Columbia resolved that such records should be public as a matter of law "both for the protection of the public against secret arrests and against the abuse in any way of the arrest power." H.R. Rep. No. 2332, 83rd Cong., 2d Sess., at 1 (1954). Congress enacted 4 D.C. Code § 135 (now codified at D.C. Official Code 5-113.01), which requires all arrest books to be "open for public inspection." Years later, the D.C. Circuit observed that this law guaranteed that there would be no "'secret arrests,' a concept odious to a democratic society." *Morrow v. District of Columbia*, 417 F.2d 728, 742 (D.C. Cir. 1969).

In two other instances in which public records laws were not yet on the books, state legislatures swiftly responded to police departments' denials of access "to continue the common law tradition of contemporaneous disclosure of individualized arrest information in order to prevent secret arrests and to mandate the continued disclosure of customary and basic law

enforcement information to the press." *County of Los Angeles v. Superior Court*, 22 Cal. Rptr. 2d 409, 416 (Cal. App. 1993) (describing California statute); *see also Gifford v. Freedom of Information Comm'n*, 631 A.2d 252, 262 (Conn. 1993) (Conn. Gen. Stat. §1-20b, which requires immediate disclosure of all adult arrestees' names, was passed "to make sure when somebody was booked there would be no way of keeping that information from the public") (quotation omitted).

2. Post-FOIA landscape

As modern federal and state freedom of information laws have proliferated, governments and courts have needed to separate "public" records from confidential ones. In every instance, basic detention information has been deemed public.

Since 1971, the Department of Justice's "guidelines to criminal actions," which apply to the release of information to the news media "from the time a person is the subject of a criminal investigation" through the termination of any proceedings, have stated that Department personnel may release "background information" regarding a detainee, such as his "name, age," and the "circumstances immediately surrounding an arrest, including the time and place of arrest." 28 C.F.R. § 50.2(b)(i) & (iv) (2003). Federal regulations further provide that confidentiality rules concerning criminal records do not apply to "original records of entry such as police blotters maintained by criminal justice agencies compiled chronologically and required by law or long-standing custom to be made public." 28 C.F.R. § 20.20(b)(2) (2003).

In the *only* reported instance (prior to this case) of a federal official refusing to disclose information regarding federal detainees, a federal district court held that it was not enough that a United States Attorney divulge the names of all persons whom had been "arrested *or* charged" with criminal violations. *Tennessean Newspaper, Inc. v. Levi,* 403 F. Supp. 1318, 1319 (M.D. Tenn. 1975) (emphasis added). The court held that FOIA also required disclosure of other "background material" that was "traditionally and routinely disseminated to the news media" under the federal regulations – arrestees' ages,

their employment status, and circumstances regarding their arrests. *Id.* at 1319-21.

States, applying state laws that mirror FOIA, consistently have reached the same conclusions with respect to state detainees. Every state provides that its police departments' arrest and detention logs open are open for public inspection, regardless of whether the detainees have been charged with any crime. *See* Bureau of Justice Statistics, *Report on the National Task Force on Privacy*, NCJ 187669 (2001), at 13. Even when states curtail access to composite information such as individual rap sheets, they still agree with the judgment of history that the urgency and seriousness of current detentions requires them to "provid[e] that other arrest-related documents, such as arrest logs, the name of the person being held in custody . . . are public documents open for inspection." Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 Urb. Law. 65, 87 (1996).[2]

What is more, by the Department of Justice's own reckoning, every state court during the post-FOIA period that has considered whether "contemporaneous information describing an arrest and an arrestee is available to the public has found some basis . . . on which to make such information available." *Original Records of Entry*, *supra,* at 37 (emphasis added). Such decisions usually have rested on state laws that replicate FOIA. *See Hengel v. City of Pine Bluff,* 821 S.W.2d 761, 764-65 (Ark. 1991) (requiring disclosure of arrest records and jail log); *Caledonian Record Publishing Co. v. Walton,* 573 A.2d 296, 299 (Vt. 1990) (arrest records); *State ex rel. Outlet Communications, Inc. v. Lancaster Police Dept.,* 528 N.E.2d 175 (Ohio 1988) (arrest record docket book); *State v. Brown,* 467 So.2d 1151 (La. App. 1985) (arrest log); *Lebanon News Publishing Co. v. City of Lebanon,* 451 A.2d 266 (Pa. Comm.

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[2] Some jurisdictions also distinguish between arrestees' names and their home addresses, making the former public but curtailing commercial enterprises' access to the latter for privacy reasons. *See, e.g., Los Angeles Police Dept. v. United Reporting Publishing Corp,* 528 U.S. 32, 34-35 (1999) (statute requiring disclosure of names but not home addresses consistent with First Amendment).

Ct. 1982) (police blotters); *Sheehan v. City of Binghampton,* 398 N.Y.S.2d 905 (App. Div. 1977) ("police blotters and booking records"); *Houston Chronicle Publishing Co. v. City of Houston,* 531 S.W.2d 177, 185 (Tex. App. 1975) ("Police Blotter, Show-up Sheet, and Arrest Sheet"); *see also* 63 Op. Att'y General 543 (Md. 1978) (arrest logs). And these decisions have emphasized not so much the existence of any formal judicial proceedings as the need for the government to divulge basic information regarding any person whose liberty it restricts. As one court noted, "it is neither necessary nor controlling to engage in a query as to whether or not a person who has been arrested . . . has been formally charged." *Outlet Communications,* 528 N.E.2d at 178.

Furthermore, of particular relevance here, the courts issuing these decisions consistently have rejected the argument for withholding that the D.C. Circuit's majority accepted here – namely, that arrest and jail logs are "investigative" in nature and thus qualify for exceptions concerning records whose disclosure that could impede law enforcement investigations. *See Hengel,* 821 S.W.2d at 764; *Caledonian Record Publishing Co.,* 573 A.2d at 299 (arrest records not subject to exemption for "detection and investigation of crime"); *Outlet Communications,* 528 N.E.2d at 177-78 (arrest record book not subject to exemption for "confidential law enforcement investigatory records" such as those that would reveal "specific investigatory techniques"); *Houston Chronicle,* 531 S.W.2d at 185 (such records do not qualify for exemption regarding "detection and investigation of crime"). Requiring disclosure merely of an arrestee's "name, race, sex," and "time of arrest," these courts have explained, is an "entirely different matter" from ordering law enforcement authorities to divulge actual investigative theories or the substance of evidence they have collected. *See Hengel,* 821 S.W.2d at 764; *Houston Chronicle,* 531 S.W.2d at 187.

Indeed, whenever any state court has had any doubt that its public records statutes generally require disclosure of arrest or jail records, it has invoked the First Amendment to prevent law

enforcement from withholding that information. In 1974, for example, when the Houston Police Department began denying access to daily "arrest sheets" that the Department previously had disclosed "[f]or as long as veteran newspaper editors and reporters could recall," the Texas Court of Appeals ordered the Department immediately to resume its prior policy of access on the ground that the "press and the public have a constitutional right of access" to such basic law enforcement activity information. *Houston Chronicle,* 531 S.W.2d at 180-81, 186-87. The Supreme Courts of Vermont, Wisconsin and Wyoming, and Justices of the Ohio Supreme Court also have held that the government's denial of access to police blotter information implicated constitutional concerns. *See Caledonian Record,* 573 A.2d at 299 (statutory access to "arrest records" compelled "[p]ursuant to First Amendment"); *Sheridan Newspapers, Inc. v. City of Sheridan,* 660 P.2d 785, 793-96 (Wyo. 1983) (police department's "blanket withdrawal of the rolling log" of arrests and incident complaints made to police violates the First Amendment and state open records statutes; case-by-case analysis is necessary); *Newspapers, Inc. v. Breier,* 279 N.W.2d 179, 187 (Wis. 1979) (public has a statutory and common law right to inspect "daily arrest list," which is "consistent with the views of the Constitution of the United States, particularly the First Amendment"); *Dayton Newspapers v. City of Dayton,* 341 N.E.2d 576, 579 (Ohio 1976) (Corrigan, J. concurring) (stating that Due Process Clause requires jail logs to be kept public; majority did not reach issue because it mandated access on statutory grounds).[3]

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[3] Some of these decisions predate this Court's creation of the First Amendment's "experience and logic" framework in *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980). But, as Justices of this Court, other courts and commentators have explained, a reasonable interpretation of that case supports the application of its framework to the type information at issue here, especially in light of the fact (*see* Pet. for Cert. at 4-5) that the Government took some affirmative steps to suppress it. *See Richmond Newspapers,* 448 U.S. at 583 (Stevens, J., concurring) (*Richmond Newspapers* test "unequivocally holds that an arbitrary interference with access *to important information* is an abridgment of the freedoms of speech and of the press protected by the First Amendment") (emphasis added); *id.* at 604 (Blackmun, J., concurring) (*Richmond Newspapers* test applies to

The D.C. Circuit's ruling here, in sum, not only is at odds with every other federal and state decision regarding access to detainees' identities, but it also creates a conflict with decisions holding that the impoundment of such information implicates the First Amendment.

B. Disclosure of Arrest and Jail Logs Serves Vital Functions in Our System of Self-Government.

The rich and previously unbroken history forbidding the categorical suppression of arrest and jail logs is grounded in sound logic. Courts and commentators have long recognized that public inspection of such logs provides a vital means of monitoring the government's use of its arrest power. Indeed, much significant press coverage would impossible without having access to such basic information regarding detainees.

1. Positive role of disclosure

The release of the names of detainees serves several functions of the highest order in our democracy:

First, disclosure of arrest records deters the government from making illegal arrests. In *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980), this Court held that the First Amendment protected the public's right to attend criminal trials in part because such access fosters "the proper functioning" of such proceedings. *Id.* at 569 (plurality opinion). As the Federalist Papers recognize, publicity regarding initial detentions likewise guards against "dangerous" or "arbitrary" governmental actions. Federalist No. 84 (Hamil-

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"the administration of justice in general"); *North Jersey Media Group v. Ashcroft,* 308 F.3d 198, 207 (3rd Cir. 2002) ("[I]n this Court, *Richmond Newspapers* is a test broadly applicable to issues of access to government proceedings."), *cert. denied,* 123 S. Ct. 2215 (2003); *Cal-Almond, Inc v. U.S. Dept. of Justice,* 960 F.2d 105, 109 (9th Cir. 1992) (*Richmond Newspapers* test is applicable to a request for a governmental agency's voter list); *Lieberman v. State Bd. of Labor Relations,* 579 A.2d 505, 513 (Conn. 1990) (following Justice Stevens' explanation of *Richmond Newspapers* test); Daniel J. Solove, *Access and Aggregation: Public Records, Privacy, and the Constitution,* 86 Minn. L. Rev. 1137, 1203 (2002) ("The rationale for a right to access turns on the need for knowledge about the government as an essential component of discourse about government. Although the Court's cases involve judicial proceedings, the rationale can logically be extended beyond such proceedings.").

ton), at 577 (J. Cooke ed. 1961). A former editor of *The Washington Post* further explained: "The police, knowing that each arrest must be [publicly] recorded, and may have to be explained, are naturally reluctant to use arrest powers frivolously. . . . The entry in the arrest book, to which the people have full access, is the individual's assurance that his disappearance will not go unnoted, the cause of his detention unmentioned, and the means of his defense unprovided." James Russell Wiggins, Freedom or Secrecy 54 (1964).

Second, disclosure of detainees' identities similarly promotes "nondiscriminatory" use of the government's arrest power. *Caledonian,* 573 A.2d at 303. Reporters, in fact, periodically review arrest logs, as Petitioners wish to do here, to undertake systematic studies in this regard. A Massachusetts newspaper, for instance, recently reviewed arrest logs in a racial profiling investigation and reported that 68% of persons arrested had Hispanic surnames. Cathleen F. Cowley, *Crime in Lawrence: "It Knows No Race,"* Mass. Eagle-Tribune (Aug. 10, 2001). Another newspaper inspected the arrest log from a Mardi Gras disturbance in order to determine the ages of eighty-four arrestees. Anne Quinn, *Magic, Not Madness,* San Luis Obispo New Times, Mar. 15, 2001, at A1.

Third, public knowledge regarding whom our government is holding in jail serves as an indispensable check against prolonging unsupported detentions or mistreating detainees. The Department of Justice itself has recognized that "[a]ccess to public record information [regarding the criminal justice system] helps the public monitor government activities, thereby assisting the public to hold elected officials and nonelected civil servants accountable and protecting against secret activities." *Report on National Task Force on Privacy, supra,* at 8. Courts have agreed, concluding that disclosing arrestees' identities "protect[s] individuals from police abuse," *Caldarola v. County of Westchester,* 343 F.3d 570, 576 n.3 (2d Cir. 2003), and from official "attempts to use the courts for tools of persecution." *Sheridan Newspapers,* 660 P.2d at 791.

This need for public monitoring of the government's arrest power is even more compelling when, as here, the government jails people without charging them with any criminal offense. As the Supreme Court of Wisconsin explained in rejecting the Milwaukee Chief of Police's desire to withhold police blotter information regarding detainees until "formal charges" were filed against them:

> An arrest represents the exercise of the power of the state to deprive a person of his liberty . . . It is an initial step in the judicial process, which may be reviewed. . . . We cannot view the arrest, as the Chief of Police does, as merely a tentative or incomplete jural act. Whether an arrest is subsequently ratified by the issuance of a charge of the same or greater magnitude at some later time, it is, nevertheless, at the time it is made, a competed official act of the executive branch of government.
>
> The power to arrest is one of the most awesome weapons in the arsenal of the state. It is an awesome weapon for the protection of the people, but it also a power that may be abused.

Breier, 279 N.W.2d at 188; *see also Seattle Times Co. v. United States District Court,* 845 F.2d 1513, 1517 (9th Cir. 1988) (logic supports First Amendment right to information relating to pretrial detention because "[t]he decision to hold a person presumed innocent of any crime without bail is one of major importance to the administration of justice") (quotation omitted). Whenever the government restrains an individual's liberty, in short, revealing the target of that action serves an important function in monitoring prosecutorial or judicial misconduct.

Fourth, disclosure of detainees' names promotes accurate factfinding in the government's investigations. In the American system of justice, the press has long played "an essential role in overseeing the investigative process and in conducting independent investigations into criminal matters." Sarah Henderson Hutt, *In Praise of Public Access,* 41 Duke

L.J. 368, 381 (1991). Court decisions thus commonly emphasize the truth-seeking value of disclosing background information regarding detainees. Publicity, for example, "enables members of the public who may come forward with additional information relevant to the law enforcement investigation." *Caldarola,* 343 F.3d at 576; *see also Detroit Free Press, Inc. v. Department of Justice,* 73 F.3d 93, 98 (6th Cir. 1996) (FOIA requires government to release mug shots of detainees in part because these photos can "reveal the government's glaring error in detaining the wrong person for an offense"); *Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n,* 710 F.2d 1165, 1178 (6th Cir. 1983) ("When information is disseminated to the public through the media, previously unidentified witnesses may come forward with evidence.").

Fifth, disclosure of the names of detainees allows the public to monitor the progress of broad-based investigations such as this one and to judge whether taxpayer dollars are being well spent. While governmental programs frequently are debated in terms of their theoretical propriety, the public often needs to learn about programs' tangible effects in order to assess their continued desirability. For example, a "name-by-name" inspection of the Washington, D.C. police log in the 1950's revealed that the Metropolitan Police Department was releasing seriously distorted crime statistics and led, in turn, to changes in law enforcement policy. Wiggins, *supra,* at 55. The current need to understand the effects of implementing a broadly expanded detention policy is no exception. If, for example, disclosing the names of the detainees would reveal that most are persons of Middle Eastern descent who do not have any links to terrorism, the public should be able to question whether the Department of Justice's policy is worth its financial cost and its impact on civil liberties.

Finally, disclosing the identities of detainees promotes public confidence in the fairness of our justice system – both at home and abroad. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to

accept what they are prohibited from observing." *Richmond Newspapers,* 448 U.S. at 572 (plurality opinion). Today, simply entering the words "arrest log" or "police blotter" into an internet search engine produces hundreds of media and police department websites reproducing such logs. While the people may not check such logs on a daily basis, it is valuable to know they could – particularly in times of national crisis. As this Court noted years ago, "the greater the importance of safeguarding the community from . . . force and violence," the "more imperative" it is to preserve channels of communication "in order to maintain the opportunity for free political discussion." *DeJonge v. Oregon,* 299 U.S. 353, 365 (1937). If, during crises, the government is allowed categorically to withhold law enforcement information that it historically has made public, the citizenry is apt to feel less, not more, secure.

2. Press coverage of terrorism investigation

The federal government's aggressive use of its detention power in its current terrorism investigation has only elevated the need for access to arrest and jail logs. Here is a sample of what *Amici* have uncovered with respect to only a handful of names:

• Hady Hassan Omar, an Arkansas resident, was arrested on September 12, 2001, and detained for seventy-three days because he bought a one-way airline ticket on the same Kinko's computer as a hijacker. Dan Eggen, *9/11 Detainee Files Lawsuit,* Wash. Post, Sept. 10, 2002, at A2. The government denied him access to an attorney, and he was intimidated and abused in prison. Matthew Brzesinski, *Hady Hassan Omar's Detention,* N.Y. Times Magazine, Oct. 27, 2002, at 50-55. No charges were ever pressed against him. *Id.*

• Nabil Almarabh, a former Boston cab driver, was taken into custody on September 18, 2001. He did not appear before a judge until arraigned in May 2002. Steve Fainaru, *Suspect Held 8 Months Without Seeing Judge,* Wash. Post, June 12, 2002, at A1. On September 3, 2002, after eleven months in custody, the government conceded it had no evidence linking

Almarabh to terrorism. Steve Fainaru, *Sept. 11 Detainee Is Ordered Deported,* Wash. Post, Sept. 4, 2002, at A10.

• Abdullah Higazy, an Egyptian student staying in a hotel near the World Trade Center on September 11, 2001, was detained for thirty-one days before all charges were dropped. Subsequently unsealed records disclosed a court-ordered investigation into whether the FBI conduct coerced him to confess to crimes he did not commit. Benjamin Weiser, *F.B.I. Faces Inquiry on a False Confession from an Egyptian Student,* N.Y. Times, Aug. 6, 2002, at B4.

Amici have no desire to jeopardize the government's terrorism investigation or to rifle through the government's files to learn the names of everyone it has questioned or has under surveillance. Nor do *Amici* deny that the government might be able to show that holding back the names of certain detainees is the only way of furthering some vital safety concern. But the D.C. Circuit's holding here that the government may withhold the names of hundreds of people that it is jailing without any individualized showing or link to terrorism threatens to stifle public scrutiny into the government's use of its arrest power. That the detainees at issue here have not even been charged with any crimes only heightens the need for the press to "bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 492 (1975).

II. The Court of Appeals' Extreme and Categorical Deference to the Government's National Security Assertions Compounds the Threat Its Decision Poses to the Accessibility of Information Traditionally Available to the Press and the Public.

The D.C. Circuit majority departed from the traditional norm of disclosing detainees' identities on the ground that the "national security" implications of the government's terrorism investigation require vastly increased deference to the government's desire to withhold this information. But instead of distinguishing this case from the unbroken precedent preceding it, the D.C. Circuit's extreme deference to the government's position compounded its error in two ways. First, the new type of deference that the court applied here endangers the media's ability to report on a variety of aspects of the "war on terror" – a fight that is likely to continue for many years without any clear end – as well as on other similar topics. Second, the D.C. Circuit's particular acceptance of the government's "mosaic" harm theory threatens to upend one of the media's customary methods of obtaining information: asking for a wide range of records and then depending on the agency at issue to disclose as much data as possible.

A. The Court of Appeals' Decision Grants Excessive Deference to Skeletal National Security Assertions.

In our post-September 11 era, national security concerns abound. No one, least of all *Amici*, disputes that the government has a compelling interest in protecting our country from terrorist attacks. But that cannot be the end of the matter, for, as the Fourth Circuit has noted:

> History teaches us how easily the specter of a threat to "national security" may be used to justify a wide variety of repressive governmental actions. A blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons would impermissibly compromise the

> independence of the judiciary and open the door to possible abuse.

In re The Washington Post Co., 807 F.2d 383, 391-92 (4th Cir. 1986); *accord United States v. Moussaoui,* 336 F.3d 279, 282 (4th Cir. 2003) (Wilkins, C.J., concurring in denial of en banc) (reaffirming this rule in context of current terrorism investigation). Accordingly, under both FOIA and the First Amendment, "the ready resort to suppression is for societies other than our own; an accommodation of competing values remains the commendable course." *In re Application & Affidavit for a Search Warrant,* 923 F.2d 324, 331 (4th Cir. 1991). Prior to this case, the prevailing law struck this balance by providing that, in assessing requests for access to information, courts owe "substantial weight" to agency explanations regarding needs for secrecy in the national security context so long as the explanations are "detailed" and reasonably plausible. *King v. Dept. of Justice,* 830 F.2d 210, 217 (D.C. Cir. 1987).

But the majority in this case below afforded virtually *preclusive* weight to officials' *skeletal* assertions that divulging the detainees' or their attorneys' identities might impede the government's terrorism investigation, stating that "the judiciary is in an extremely poor position to second-guess the executive's judgment in this area of national security." Pet. App. 17a. Under this decision, the government need only be willing to utter the words "national security," and it essentially is categorically exempt from any norm of openness.

The media cannot perform their proper role of oversight under such a system. There are always going to be policies that the government would prefer not to open up to public scrutiny. It is the purpose of FOIA and the First Amendment, however, and the duty of the courts to demand that the government give detailed explanations under oath (*in camera* if necessary) when it claims that national security concerns should excuse it from disclosing information that ordinarily is made available as a check on its powers. If the D.C. Circuit's abdication of this duty is allowed to stand, the media may be

improperly stymied from reporting not only on law enforcement's recent treatment of persons detained on American soil, but also on many other aspects of the government's "war on terror" and similar future policies. This Court should not allow the government to draw a curtain over such serious matters.

B. The Court of Appeals' Decision Adopts an Overly Broad "Mosaic" Rule.

While the government has advanced several general reasons why disclosing the names of the particular detainees could allegedly harm the terrorism investigation, *see* Pet. for Cert. at 21, the issue in this case is not whether the government may withhold the names of *some* detainees; it is whether it may assume a policy of withholding the names of *all* detainees, regardless of whether they have been cleared of any potential link to terrorism or have any ongoing relevance to the government's investigation. Only one of the government's arguments conceivably applies to *all* of the detainees: that the disclosure could reveal a "mosaic" that could assist terrorists in avoiding detection and plotting future attacks. Pet. App. 18a. The D.C. Circuit majority accepted this argument, holding that:

> Importantly, plaintiffs here do not request "bits and pieces" of information, but rather seek the names of *every single individual* detained in the course of the government's terrorism investigation. It is more than reasonable to expect that disclosing the name of *every individual* detained in the post-September 11 terrorism investigation would interfere with that investigation.

Pet. App. 18a-19a (emphasis added). The majority ruled, in other words, that because Petitioners requested too much information, they are not entitled to any information.

This logic turns FOIA on its head. It seriously threatens the customary method the media use to gather information from governmental agencies concerning sensitive issues. And it conflicts with the law in every other federal court to address "mosaic"-type arguments.

As courts have noted, FOIA disputes are characterized by an "asymmetrical distribution of knowledge." *McDonnell v. United States,* 4 F.3d 1227, 1241 (3rd Cir. 1993); *accord King,* 830 F.2d at 218. "[T]he party seeking disclosure does not know the contents of the information sought," *Ferri v. Bell,* 645 F.2d 1213, 1222 (3rd Cir. 1991), and, consequently, it often cannot be expected to predict the potential effect of disclosure on ongoing governmental investigations or other interests. *See King,* 830 F.2d at 218.

FOIA attends to this reality by providing that parties requesting information need not narrowly tailor their requests to exclude any information that may be exempt from disclosure or that may trigger otherwise uncongealed security threats. Instead, the burden falls on the government to identify any barriers to disclosure and, if any such barrier exists, to divulge "[a]ny reasonably segregable portion" of the requested records. 5 U.S.C. § 552(b); *see also, e.g., Rugiero v. U.S. Dept. of Justice,* 257 F.3d 534, 553-54 (6th Cir. 2001) (enforcing segregability doctrine); *Kimberlin v. Department of Justice,* 139 F.3d 944, 949-50 (D.C. Cir. 1998) (same); *Church of Scientology v. U.S. Dept. of the Army,* 611 F.2d 738, 743-44 (9th Cir. 1980) (same in context of national security objection).

Following this framework, the media typically submit broad FOIA requests when covering sensitive governmental operations and depend on the government to disclose as much information as possible. A governmental agency, to be sure, may withhold information when it could be combined "with other *known* data" to impede a law enforcement investigation. *Davin v. U.S. Dept. of Justice,* 60 F.3d 1043, 1064 (3rd Cir. 1995) (emphasis added); *accord Coastal Delivery Corp. v. U.S. Customs Serv.,* 272 F. Supp.2d 958, 965 (C.D. Cal. 2003) ("other known data"); *Edmonds v. FBI,* 272 F. Supp.2d 35, 47 (D.D.C. 2003) (other information "already in the public arena"); *see also Central Intelligence Agency v. Sims,* 471 U.S. 159, 178 (1985) (withholding information permissible when a person who is already "knowledgeable" could use it to discover the identity of an intelligence source). But until the D.C.

Circuit's "mosaic" holding in this case, no court had ever held that the government could withhold data that, if combined with other, *unknown* data that *it also is withholding*, could impede a law enforcement investigation.

This holding creates dangerous new law and should be reviewed by this Court. The very purpose of FOIA is to grant the press and the public "a broad right of access to official information" about the workings of our government. *U.S. Dept. of Justice v. Reporters Comm. for Freedom of the Press,* 489 U.S. 749, 772 (1989) (internal quotation omitted). But the D.C. Circuit's new mosaic rule penalizes parties for requesting too much information. That is, instead of requiring the government to release as much information as possible, the D.C. Circuit's rule allows the government to use the breadth of a FOIA request as an excuse to thwart the request in its entirety. This rule could be invoked to justify all sorts of broad-based, secretive policies. Indeed, as the Sixth Circuit correctly observed in the related context of closing deportation hearings, "there seems to be no limit to the government's [mosaic intelligence] argument." *Detroit Free Press v. Ashcroft,* 303 F.3d at 681, 709 (6th Cir. 2002). This Court should take action now to prevent this serious threat to our Nation's commitment to open government from taking root in federal jurisprudence.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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October 30, 2003

APPENDIX A

DESCRIPTIONS OF *AMICI*

The Washington Post Company publishes the newspaper *The Washington Post,* a daily newspaper with a nationwide daily circulation of over 782,000 and a Sunday circulation of over 1.06 million.

ABC, Inc., through its subsidiaries, owns ABC News, the ABC Radio Network, and local broadcast television stations that gather and report news to the public. ABC produces, among other programs, the news programs *World News Tonight with Peter Jennings*, *20/20*, and *Nightline*.

American Society of Newspaper Editors, Inc. is a non-profit organization founded in 1922 and has a nationwide membership of approximately 850 persons who hold positions as directing editors of daily newspapers.

The Associated Press, founded in 1848, is the world's oldest and largest newsgathering association, providing content to more than 15,000 news outlets. Its multimedia services are distributed by satellite and the Internet to more than 120 nations.

The Association of American Publishers, Inc. ("AAP") is the national association in the United States of publishers of general books, textbooks and educational materials. AAP's approximately 300 members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of the general, educational and religious books and materials produced in the United States.

The British Broadcasting Corporation ("BBC") is the United Kingdom's largest public service broadcaster responsible, *inter alia*, for the broadcast, in the UK, of eight television channels; nine national radio stations; numerous regional and local radio stations; and an Online website.

Internationally, the BBC broadcasts for the World Service and (through its subsidiaries) the BBC World television channel.

CBS Broadcasting Inc. produces and broadcasts news, public affairs, and entertainment programming. CBS News produces morning, evening, and weekend news programming, as well as news and public affair magazine shows, such as *60 Minutes* and *48 Hours*. CBS owns and operates broadcast television stations nationwide and, through a related company, Infinity Broadcasting Corp-oration, owns and operates radio stations throughout the country.

Cable News Network L.P., LLLP, a division of Turner Broadcasting System, Inc., a Time Warner Company, is one the world's most respected and trusted sources for news and information. Its reach extends to 15 cable and satellite television networks; 12 Internet websites, including CNN.com; three private place-based networks; two radio networks; and CNN Newsource, the world's most extensively syndicated news service. CNN's combined branded networks and services are available to more than one billion people in more than 212 countries and territories.

Gannett Company, Inc. is an international news and information company that publishes one hundred daily newspapers in the United States with a combined daily paid circulation of 7.7 million, including *USA Today*, which has a circulation of 2.3 million. Gannett publishes a variety of non-daily publications, including *USA Weekend*, a weekly newspaper magazine with a circulation of 23.7 million. The company also operates more than one hundred web sites in the United States and a national news service. Gannett's twenty-two television stations cover 17.8 percent of the United States.

The Hearst Corporation is a diversified, privately held media company that publishes newspapers, consumer magazines and business publications. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces movies and other programming for tele-

vision and is the majority owner of Hearst-Argyle Television, Inc., a publicly held company that owns and operates numerous television broadcast stations.

Magazine Publishers of America, Inc. is a national trade association including in its present membership more than 240 domestic magazine publishers who publish over 1,400 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports, agriculture, industry and many other interests, avocations and pastimes of the American people. MPA has a long and distinguished record of activity in defense of the First Amendment.

The McClatchy Company publishes eleven daily newspapers and thirteen non-daily newspapers in California and other states including *The Sacramento Bee*, the *Star Tribune* in Minneapolis, Minnesota, *The News & Observer* in Raleigh, North Carolina and *The Fresno Bee*. The newspapers have a combined average circulation of 1,400,000 daily and 1,900,000 Sunday.

National Broadcasting Company, Inc. ("NBC") is a diversified media company that produces and distributes news, entertainment and sports programming via broadcast television, cable television, the Internet and other distribution channels. The NBC News division provides news and public affairs programming to more than 200 affiliated television stations across the country, including 14 stations that are owned and operated by NBC and that also separately produce and broadcast local news and public affairs programs. NBC also owns and operates the Telemundo Spanish-language television network and station group, the cable business news network CNBC, the cable arts and entertainment network Bravo, and MSNBC, a 24-hour cable news network that is jointly owned with Microsoft.

National Press Club, established in 1908, is an organization of journalists and communicators with nearly 4,000 members in Washington, D.C. and around the world. Created in part to promote the ethical standards of journalists, the National Press Club serves as a center for the advancement of professional standards and skills and the promotion of free expression.

National Public Radio, Inc. ("NPR") is a non-profit organization incorporated in the District of Columbia. It is a membership organization composed of more than 680 public radio stations located throughout the United States and serves a growing broadcast audience of over 19 million Americans weekly. NPR gathers and reports the news through its award winning programs, including *Morning Edition, All Things Considered,* and *Talk of the Nation.* It also distributes its broadcast programming on-line, adding additional news features, and distributes its broadcasts worldwide through satellite and cable distribution, and to U.S. Military installations via the American Forces Network.

The New York Times Company publishes *The New York Times,* a national newspaper distributed throughout New York State and the world. Its weekday circulation is the third highest in the country at approximately 1.1 million, and its Sunday circulation is the largest at approximately 1.7 million. The Company also publishes sixteen other newspapers, including *The Boston Globe*, and owns and operates eight television stations and two radio stations.

The Newspaper Association of America ("NAA") is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of NAA's key strategic priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

North Jersey Media Group Inc. publishes two daily newspapers – *The Record* (Bergen County, NJ) and *Herald News* (Passaic County, NJ) – with a combined daily circulation of 185,000 and 225,000 on Sunday. In addition, North Jersey Media Group publishes 34 community newspapers, whose weekly circulation of 420,000 is in Bergen, Essex, Morris, and Passaic counties, NJ. In addition, the Company owns and operates a commercial printing business. The company has been family-owned since 1930.

Philadelphia Newspapers, Inc. is the publisher of *The Philadelphia Inquirer* and the *Philadelphia Daily News*, both newspapers of general circulation primarily in the Philadelphia region. It is a wholly owned subsidiary of Knight Ridder, Inc., the stock of which is publicly held and traded.

Radio-Television News Directors Association ("RTNDA"), based in Washington, D.C., is the world's largest and only professional organization devoted exclusively to electronic journalism. RTNDA is made up of more than 3,000 news directors, news directors, news associates, educators and students in radio, television, cable and other electronic media in over 30 countries. RTNDA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Silha Center for the Study of Media Ethics and the Law is a research center located within the School of Journalism and Mass Communication at the University of Minnesota. Its primary mission is to conduct research on, and promote understanding of, legal and ethical issues affecting the mass media.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to

inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

Tribune Company, through its publishing, broadcasting, and interactive operations, publishes eleven market-leading newspapers including *The Baltimore Sun*, *Chicago Tribune*, *Los Angeles Times*, *Newsday,* and the *Orlando Sentinel*; owns and operates 26 major market television stations; and operates a network of local and national news and information web sites throughout the United States.

APPENDIX B

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